Supreme Court, U.S.
FILED

94 No. 528 SEP 21 1994

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In The

Supreme Court of the United States

October Term, 1994

DONALD HAYDOO, *et al.*,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR.; INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL AND SALARIED WORKERS, AFL-CIO and GENERAL ELECTRIC PENSION FUND BOARD,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether dismissal of an action because an attorney of record other than "lead counsel" signed a motion is an abuse of discretion.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Donald Haydoo, *et al.*, individually and on behalf of all persons similarly situated, as listed in the second appendix, *infra* at App. 99a. This is a class action in which the class has not been certified. The respondents are the General Electric Company; John F. Welch, Jr.; the International Union of Electrical, Technical and Salaried Workers, AFL-CIO; and the General Electric Pension Fund Board.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Donald Haydoo, *et al.*, individually and on behalf of all other persons similarly situated, as listed in the second appendix, Appendix, *infra* at 99a, respectfully request that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 21, 1994 and August 1, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the Appendix at 1a. The petitioners' Petition for Rehearing *en banc* was filed on July 5, 1994, and is reprinted in the Appendix at 17a. The order of the Court of Appeals for the Sixth Circuit denying petitioners' Petition for Rehearing *en banc* is reprinted in the Appendix at 44a.

The order of the United States District Court for the Northern District of Ohio denying petitioners' Motion to Reinstate has not been reported. It is reprinted in the Appendix at 46a.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on June 21, 1994. A timely petition for rehearing *en banc* was denied on August 1, 1994.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. § 1254(1):

> Courts of appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal

case, before or after rendition of judgment or decree;

28 U.S.C. § 1446:

Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1331:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the

United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this

subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

29 U.S.C. § 151 *et seq.* ("N.L.R.A."):

Findings and policies

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages is such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such

commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 185(a) ("L.M.R.A."):

Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 626(c) ("A.D.E.A."):

> Recordkeeping, investigation, and enforcement
>
> (c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial. (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, that the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.
>
> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. § 1001 *et seq.* ("ERISA"), § 1132(e):

> Civil enforcement
>
> (e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the

United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Federal Rules of Civil Procedure, Rule 11:

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information,

and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Federal Rules of Civil Procedure, Rule 41(b):

Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

This is a procedural matter, and the facts pertinent to the question presented are brief.

This action was originally filed in the Court of Common Pleas for Cuyahoga County, Ohio on December 28, 1988. App. 48a. Defendants removed to the United States District Court for the Northern District of Ohio on January 27, 1989, in that the federal court had original jurisdiction, without regard to amount in controversy, under the provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("N.L.R.A."); Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("L.M.R.A."); the Age Discrimination in Employment Act, 29 U.S.C. § 626 ("A.D.E.A."); and the Employee Retirement Income Security Act of 1974 29 U.S.C. § 1001 *et seq.* ("ERISA"). App. 54a.

In a Memorandum Opinion and Order issued December 30, 1992, App. 60a, the district court adopted two Report and Recommendations issued by the magistrate judge on June 27, 1991, App. 65a-67a, thereby dismissing this action. The order specified:

> The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management.

Memorandum Opinion and Order issued December, 30, 1992, App. 61a.

Petitioners timely filed a Motion to Reinstate on January 1
1993. App. 68a. Rebecca L. Todt, the senior of two attorneys
record whose names and addresses appeared on every motion th
petitioners filed, signed this motion.

Respondents opposed the Motion to Reinstate on January 22
1993, App. 70a. Respondents argued that the assurances which th
district court had asked for were "vague", and made a great issue o
the fact that Mrs. Todt, "his [Mr. Todt's] spouse"[1], rather than Mr
Todt, had signed the motion. On February 25, 1993, the distric
court issued its order denying Petitioners' Motion to Reinstate
basing its denial on the fact that Mrs. Todt, "second chair", rathe
than Mr. Todt, "lead counsel", had signed the motion. App. 47a.

A timely appeal was filed in the United States Court of
Appeals for the Sixth Circuit on March 29, 1993. App. 76a. The
Sixth Circuit affirmed the decision of the district court.

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1. *See* Joint Brief of all Defendants in Opposition to Motion to Reinstate, filed January 22, 1993, App. 70a.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S AFFIRMATION OF DISMISSAL OF A CASE BECAUSE AN ATTORNEY OF RECORD WHO WAS NOT "LEAD COUNSEL" SIGNED A MOTION WAS AN ABUSE OF DISCRETION THAT DEPARTED SO FAR FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWERS OF SUPERVISION. ADDITIONALLY, THIS IS A CASE OF FIRST IMPRESSION FOR THIS COURT.

The Sixth Circuit states at page 11 of its decision that:

> [t]he court dismissed the action based on prior dilatory case management and the failure to comply with the magistrate judge's orders.

Opinion of the United States Court of Appeals for the Sixth Circuit, App. 12a.

It appears that a miscommunication reared its ugly head during the case's progress from Magistrate Perelman through Judge Lambros and on to the Sixth Circuit; the above quote does not dovetail with Judge Lambros' own reasons for dismissing the case.

In his order of February 25, 1993, App. 46a, Judge Lambros based his denial of Petitioners' Motion for Reinstatement, App. 68a, on the following:

> Seeing that Mr. Todt, as lead counsel, cannot make the commitments or sign the

> certification, the motion for reinstatement must be denied. Accordingly, a judgment is entered.

Memorandum Opinion and Order of February 25, 1993. App. 47a

The Sixth Circuit affirmed the dismissal, but stated that th "[c]ourt dismissed action based on prior dilatory case managemen and the failure to comply with the magistrate judge's orders." Opinion of the Sixth Circuit Court of Appeals, filed June 21, 1994 App. 12a. The Sixth Circuit Court of Appeals, in other words stated that the district court had dismissed the case for reasons different from those the judge in the district court had himself articulate. Surely this is an abuse of discretion in itself. However had Judge Lambros, *arguendo*, dismissed at the district court level for the reasons the appellate court claims he did, such dismissal would still be an abuse of discretion. *See Little v. Yeutter*, 984 F.2d 160, 162 (6th Cir. 1993), *infra*.

Magistrate Perelman recommended dismissal in his Report and Recommendations of June 27, 1991. App. 62a. Judge Lambros adopted and approved Magistrate Perelman's Report and Recommendations, and his language was as follows:

> The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management.

Memorandum Opinion and Order issued December, 30, 1992, App. 61a.

The petitioners' motion to reinstate was timely filed on January 12, 1993, App. 68a, and states that Rebecca L. Todt, one of the two attorneys of record in this action,

> [c]ertify [-ies] to this Court that all briefing to date has been completed, and that they [the plaintiffs] have complied with all discovery requests presented to them. * * * Rebecca L. Todt hereby certifies to this Court that in the future all time-lines established for case management will be met by the Plaintiffs and that procedures will be established to ensure that similar situations will not occur in the future.

Plaintiffs' Motion to Reinstate filed on January 12, 1993, App. 68a.

Comparison of the two quotes shows that Mrs. Todt specifically addressed each point about which Judge Lambros voiced concern; briefing, discovery, and case management. She certified, denoting some elevated degree of commitment, that each of the three elements either had been met or would be met, as Judge Lambros' order delineated.

Respondents filed a joint brief in opposition to the petitioners' motion. Among their arguments were the following:

> Plaintiffs' "certification", which plaintiffs' lead counsel did not sign, consists of a vague assurance of future compliance, coupled with the acknowledgment that lead counsel will be "temporarily" unavailable to participate in this action due to *unspecified* "international commitments". (emphasis supplied); * * *

> insufficient to comply with the letter and intent of this Court's Order and does not warrant reinstatement of the action. * * * linked to the admission that unexplained "international commitments" will require plaintiffs' lead counsel to "*temporarily*" *relinquish primary responsibility for this litigation to his spouse,* . . .

(Emphasis added). Joint Brief of all Defendants in Opposition to Motion to Reinstate, filed on January 22, 1993. App. 70a.

The gist of the above is that Judge Lambros did not refuse to reinstate the case because he was not satisfied with counsel's assurances of future "good behavior", but *rather because he was evidently persuaded by the defendants' arguments that "his* [Mr. Todt's] *spouse", one of the attorneys of record, having signed the motion/certification was somehow significant.* He said so himself in the order of December 30, 1992:

> Seeing that Mr. Todt, as lead counsel, cannot make the commitments or sign the certification, the motion for reinstatement must be denied. Accordingly, a judgment is entered.

Memorandum Opinion and Order of February 25, 1993. App. 47a.

The above statement is simply not a legitimate reason for dismissing a motion, as the cited law will show, *infra*, not to mention that the respondents' arguments were something less than persuasive in that:

1. Substituting one equally valid signature for another cannot

be considered "dilatory". Webster's Third New International Dictionary defines "dilatory" as follows:

> 1: tending or having the intent to cause delay <obstructive and ~ tactics>
>
> 2: characterized by procrastination or delay: TARDY: SLOW <he is ~ in answering letters> <~ payment of bills> syn see SLOW

The petitioners' conduct would have been dilatory had Mrs. Todt not signed the motion, but somehow delayed until Mr. Todt returned. The petitioners' were therefore placed in a Kafka-esque situation: Suffering the ultimate punishment in a court case, dismissal, for being prompt.

2. Mr. Todt's absence was by no means "unspecified". All parties were at that time aware that Mr. Todt was in Germany obtaining information regarding financial claims against G.E., and that he participated in responding to the order, but he was unable to sign the motion due to his absence. Furthermore, Mrs. Todt explained in the motion that the attorney/client privilege prohibited further clarification.

3. Both respondents' counsel and the district court had communicated with petitioners' counsel on any number of occasions through the mail. This mail was regularly addressed to Mrs. Todt, with Mr. Todt's name following. *See* App. 83a-84a. The irony of respondents' counsel acknowledging Mrs. Todt's name as properly appearing before Mr. Todt's throughout the three year history of the litigation, and then turning 180 degrees arguing that a motion is invalid because she signed it, rather than Mr. Todt having signed it, is evident. It is, to be sure, even more ironic that the district court, which addressed communications to the petitioners' counsel in precisely the same fashion, would perform the same

about-face and find a motion invalid because it was signed by t attorney whose name appears before any other when addressi communications to that firm.

4. Derisive sexist comments referring to an attorney of reco as "his spouse" are nowhere specifically prohibited, but decoru demands at least a modicum of civility and respect betwee adversaries, just as it demands that a United States District Cou Judge neither acquiesce to nor condone such comments. More t the point, *there is no legal precedent holding that a pleading o motion must be signed by any one particular attorney;* any attorne of record may sign the pleading.[2]

Rule 11 of the Federal Rules of Civil Procedure reads i pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by *at least one attorney of record* in the attorney's individual name, whose address shall be stated * * *

(Emphasis added). F.R.C.P. 11.

Nowhere does either the rule or any of the ensuing case law specify that a pleading or motion is invalid because the "wrong" attorney of record signed it. Indeed, as will be shown *infra*, the case law supports joint and several responsibility among lead counsel and any other attorneys of record for all aspects of motion practice and case management. To wit; the pleading or motion is

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2. Ironically enough, the signature line on the Certificate of Service of respondents' brief in opposition, where they raised all the brouhaha about which attorney signs the motion, is captioned "One of the Attorneys of Record". App. 75a.

valid if it is signed by "at least one attorney of record in the attorney's individual name . . .". F.R.C.P. 11. *See also Frederick v. Koziol*, 130 F.R.D. 620 (E.D. Virginia, 1990), *infra*.

The unbelievable nature of a party or a judge even concerning themselves with which attorney of record signs a motion is underscored by the minimal amount of case law on the issue. *Frederick v. Koziol*, 130 F.R.D. 620 (E.D. Virginia, 1990), addresses this issue from the periphery. The *Frederick* court held that service of a pleading to one of two attorneys of record triggered the running of the period for demanding a jury trial, even though the other attorney, the designated "lead counsel", received no copy thereof. To quote the court:

> Plaintiff seeks to escape this conclusion by arguing that the thirteen (13) day period should be computed from February 22, 1990, the date on which the second of his two attorneys received copies of Thereault, Hundley, and Koziol's [Defendant's counsel] answers and grounds of defense. Plaintiff is represented Gary C. Byler and William H. Hurd, both of whom are members of the bar of this court. Plaintiff contends that Hurd is his "lead counsel" and as such "has responsibility for insuring compliance with the applicable federal timetables and rules of procedure. . .". Amended Memorandum in Support of Demand for trial by Jury, *Frederick v. Koziol*, Civil Action No. 89-594-N, at para. 8 (March 9, 1990). Plaintiff maintains that the arrangement of names and signatures on the complaint shows that Hurd is lead counsel. *Id.*, at para. 5. *Plaintiff cites no legal authority for this distinction and for these designated roles of his*

> *co-counsel,*[3] other than his incorrect assertion that Byler serves only as his "local counsel".

(Emphasis added). *Frederick*, 130 F.R.D. 620 at 621.

The court continued:

> As counsel,[4] Byler is responsible for plaintiff's case, and his responsibilities include timely compliance with Federal Rule of Civil Procedure 38(b) and Local Rule 20(A).

Id. at 621.

In the footnote appearing at the end of the above quote, the court added:

> Both Byler and Hurd, as local co-counsel, were and are individually, as well as jointly, responsible for the case, including timely filings.

Id. at 621.

Surely Mr. and Mrs. Todt, by having Mrs. Todt sign the motion, acted no differently than the *Frederick* court would have had Mr. Byler and Mr. Hurd act in sharing responsibility for timely filings.

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3. Frederick and his counsel cited no such authority because none exists, in Virginia or anywhere else.

4. With no distinction made between lead and co-counsel.

The *Frederick* court is not the only authority adopting this view:

> When a party is represented by more than one attorney of record, service upon any one of them is sufficient.

2 J. Moore, J. Lucas, H. Fink & C. Thompson, *Moore's Federal Practice*, para. 5.07 at 5-26 and 5-27 (2d ed. 1989).

If an attorney of record may, to quote Rule 11, receive a "pleading, motion, and [or] other paper of a party", and have service on all attorneys of record be valid, only the smallest inferential leap imaginable is necessary to conclude that any attorney of record may also sign a pleading or motion for it to be effective.

Indeed, even if Judge Lambros had found Mrs. Todt's certification unpersuasive and chosen to dismiss for that reason,[5] (he hadn't, as his order shows, App. 61a), the Sixth Circuit could not affirm the decision without running afoul of what is, according to Rule 11, implicit in an attorney of record affixing his or her signature to a pleading or motion.

> Whether an attorney has complied with the requirements of Rule 11 is determined not by the apparent absence or presence of good faith on the part of the attorney, but rather by the objective reasonableness of his actions.

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5. As did the appellate court at page 11 of its opinion, referring to dilatory case management and failure to comply with the magistrate judge's orders, App. 12a.

Johnson v. Veteran's Administration, 107 F.R.D. 626, 628 (N.D Miss. 1985).

Evidently Mrs. Todt certifying that she would carry out the necessary promises, and then signing this certification, knowing that she would be subject to Rule 11 sanctions should she not carry through, appeared to the court either to be objectively unreasonable, or it was insufficient to convince the court that she would indeed follow through with regard to discovery, briefing, and future punctuality. If the court agreed with the respondents and found her promise "insufficient to comply with the letter and intent of this Court's Order and * * * not warrant reinstatement of the action", (Joint Brief of all Defendants in Opposition to Motion to Reinstate, filed on January 22, 1993, App. 73a), why did it not specify what sort of affirmation it would have found acceptable? As previously stated, Mrs. Todt certified to the court everything that it asked for. While no such precedent exists, if the court required an oath written in blood to reinstate, why did it not ask for one, rather than simply a "[m]otion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management"? If the court, or indeed, opposing counsel doubted her sincerity, why did they neither impose nor move for Rule 11 sanctions?

Given the above factual background, it is logically impossible to justify dismissing the case because of inadequacies in the Motion to Reinstate. The motion provided the court with what it asked for with regard to briefing, discovery, and case management. It was signed in accordance with every piece of legislation and every prior decision concerning who may sign a motion and what effect this signature has. It is therefore an abuse of discretion for the Sixth Circuit Court of Appeals to affirm the dismissal of this case for reasons either of signature or insufficiency. Such a decision conflicts with any statute or previous decision that this issue might implicate.

Judge Lambros' ruling, and its subsequent affirmation, are an abuse of discretion according to *Little v. Yeutter*, 984 F.2d 160, 162 (6th Cir. 1993), *infra*. In affirming Judge Lambros' decision, the Sixth Circuit relied in its ruling on *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). In *Link*, this Court, Mr. Justice Harlan writing for the majority, held that it was not an abuse of discretion for the district court to dismiss for want of prosecution when petitioners' counsel failed to appear at a scheduled pre-trial conference, offering the excuse that he was preparing papers to file with the state supreme court, in view of a history of prior delays in the case.

Two factors distinguish *Link* from the case at bar:

> 1. Judge Lambros did not dismiss for failure to prosecute, he dismissed, as pointed out *supra*, because "[M]r. Todt, as lead counsel, cannot make the commitments or sign the certification". App. 47a. Surely the parties are justified in relying on the plain language of the court's order in determining why the case was dismissed. For the reasons shown above, dismissal based on the lead counsel not signing the motion is an abuse of discretion.
>
> 2. The facts do not show anything remotely related to petitioners' counsel not moving forward with the suit at the time Judge Lambros asked for certification of completion of briefing and discovery and compliance with case management deadlines. It is not at all as if no one showed up at the critical time, leaving the petitioners with no one to protect their interests, as was the situation with which this Court was confronted in *Link*. Rather, another

> attorney of record complied to the letter with the court's directives. In no way, shape, or form can one argue that the petitioners were without representation, as was the case in *Link*, or that counsel was not pushing the case forward at the time of dismissal. Petitioners' counsel of record timely submitted the Motion to Reinstate, affirming that for which the court had asked, and with a proper signature. Dismissal under these circumstances is indeed an abuse of discretion, or at the very least, not supported by *Link*, in that the factual backgrounds of the two cases do not dovetail.

Indeed, the Sixth Circuit Court of Appeals itself laid out in it opinion, App. 1a, the circumstances under which dismissal i proper, among them, "[e]xtreme situations where there is showing of a clear record of delay or contumacious conduct by th plaintiff.", *Harris v. Callwood*, 844 F.2d 1254 (6th Cir. 1988) (citing *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1985)). Th *Harris* opinion also added that the imposition of a lesser sanction i necessary absent such a clear record of delay. Absent such record, ordering dismissal, "is an abuse of discretion, such that the district court is limited to lesser sanctions designed to achieve compliance." *Little v. Yeutter*, 984 F.2d 160, 162 (6th Cir. 1993), (citing *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980)). Again, the petitioners in the action before this Court wish to point out that their counsel had agreed, in print and with signature, to comply with all that the district court asked of them, and this very agreement was the basis for dismissal.

The question then becomes what sort of conduct amounts to a "showing of a clear record of delay or contumacious conduct by the plaintiff". In the eyes of the Sixth Circuit:

> [t]he key is a failure to prosecute, whether styled as a failure to appear at a pre-trial conference, failure to file a pre-trial statement, failure to prepare for a conference, or failure to comply with the pretrial order.

Carter, 636 F.2d at 161 (citing *J.F. Edwards Constr. Co. v. Anderson Safety Guard Rail Corp.*, 542 F.2d 1318, 1323 (7th Cir. 1976)).

Other examples include failure to respond to a show cause order, failure to provide the court with changes of address, failure to file necessary documents, and lack of responses to motions. *See Buck v. Dept. of Agriculture*, 960 F.2d 603, 608 (6th Cir. 1992).

None of the above examples apply to the petitioners' counsel in the action before this Court. Petitioners filed timely motions and responses in each and every circumstance requiring such, admittedly after procuring more than a few extensions. Nonetheless, the filings were timely.[6] *Never* was there a failure to

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6. There is some controversy as to whether the petitioners' Request for Reconsideration and Modification of Orders and Objections to Reports and Recommendations, filed July 10, 1991, App. 85a, may be considered timely. Petitioners' counsel received notice of the magistrate's June 12th deadline on July 5, 1991. App. 97a, Affidavit of Sandra Merkle.

Petitioners' position is that they were timely; an objection is not untimely when the magistrate has not informed the parties of the deadline. *See Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992).

Alternatively, where the non-moving party has not objected on grounds of timeliness, (and the defendants only raised that issue on appeal), if the district court considers the objections, (which they were required to do in this case), an implicit extension results. *Nabors v. United States*, 929 F.2d 354 (8th Cir. 1990).

(Cont'd)

appear; *never* was there a failure to file; *never* was there a failure to comply with an order; *never* was there a failure to respond. Dismissal of the case for reasons either of dilatory case management of improper signature under the above related circumstances is therefore an abuse of discretion according to *Little*. This case therefore merits review by this Court.

CONCLUSION

For these various reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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(Cont'd)

Finally, if the Request for Reconsideration and Modification of Orders and Objections to Reports and Recommendations are to be seen as untimely, they are only one filing. One late filing is one more than optimal, but one of over 100 constitutes neither a repetitious pattern nor a "clear record of delay or contumacious conduct".

APPENDIX A — *HAYDOO, ET AL. V. GENERAL ELECTRIC, ET AL.* (UNREPORTED DECISION CASE NUMBER 93-3367) DATED JUNE 21, 1994

93-3367

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD HAYDOO, ET AL.,

Plaintiffs - Appellants,

v.

GENERAL ELECTRIC, ET AL.,

Defendants - Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: KEITH and SUHRHEINRICH, Circuit Judges; and JOINER, Senior District Judge.*

PER CURIAM. Plaintiffs ("Plaintiffs") appeal the district court's dismissal of their action for failure to prosecute pursuant to Fed.R.Civ.P. 41(b). For the reasons stated below, we AFFIRM the dismissal.

I. Statement of the Case

This action arose from Defendant General Electric's decision to close the Cleveland Equipment Plant ("CEP") as part of a general restructuring. Plaintiffs include 110 former CEP

* The Honorable Charles W. Joiner, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

employees. Before General Electric ("GE") closed CEP, the plant employed approximately 240 hourly, union represented employees. With five exceptions, all Plaintiffs were terminated when the plant closed on December 2, 1987.[2]

The matter before this court is whether the district court properly dismissed this case for dilatory case management pursuant to Fed.R.Civ.P. 41. We, therefore, must detail the action's four-year procedural history.

On December 27, 1988, Plaintiffs first filed this action in Ohio state court, on behalf of the primary named Plaintiff, Donald Haydoo, and ten other Plaintiffs. The Defendants included GE, GE's Chief Executive Officer Jack Welch ("Welch"), the International Union of Electronic, Electrical, Technical Salaried and Machine Workers, AFL-CIO ("IUE"), the Pension Board of General Electric Pension Fund ("Pension Fund"), and unknown Defendants. The Defendants removed the action to the Federal District Court for the Northern District of Ohio and Plaintiffs subsequently filed their "First Amended Complaint" adding 100 new plaintiffs and ten counts.

Most counts challenged the plant closing. All plaintiffs alleged they were former CEP employees and GE shareholders. Based upon their former employment and relationship with GE, Plaintiffs alleged violations of the National Labor Relations Act, 29 U.S.C. § 158 ("NLRA"); § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"); the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"); and the Age Discrimination in Employment Act, 29

2. Plaintiffs Spotts, Hudak, Mackura, and Malm, all voluntarily retired during the first five months of 1987, and Bowman's employment terminated automatically upon the expiration of his two-year unpaid leave of absence.

U.S.C. § 621 *et seq.* ("ADEA"). Plaintiffs also asserted various pendent state claims including an Ohio statutory shareholders' derivative action.

In their complaint, Plaintiffs argued GE violated the National Bargaining Agreement by closing CEP and contracting out to other companies when the work could have remained at CEP. Plaintiffs next alleged GE withheld information about pension rights stemming from the closing. Further, Plaintiffs argued that, although GE planned to close CEP, management allowed persons who were unaware of the scheduled closing to retire earlier and lose benefits linked to the plant closing. Finally, the complaint alleged that the closing disparately impacted employees over the age of 40. With respect to IUE, Plaintiffs claimed the closing of CEP violated the labor agreement between IUE and GE, and IUE should have prevented the closing.

On July 24, 1989, GE, Pension Fund, and Welch each filed motions to dismiss counts 4 - 9. These counts included five state law claims and a shareholder derivative claim. The Defendants asserted: (1) the shareholder derivative claim did not meet Rule 23.1 pleading requirements, and was barred by conflicts of interest; (2) the remaining state law claims were preempted by ERISA, or the NLRA; and, alternatively, (3) the state claims were subject to dismissal because Plaintiffs had not pleaded and could not prove the elements of the claims.

In response, Plaintiffs filed motions seeking to: (1) amend the complaint for the second time; (2) disqualify Defendants' attorneys; (3) certify classes of Plaintiffs; and (4) depose Welch pursuant to Fed.R.Civ.P. 56(f). Later, in September 1989, Plaintiffs filed a "Brief in Opposition" to Defendants' motion for summary judgment. This "brief" included a cartoon, a paraphrase of Shakespeare, a quote from one Plaintiff, and two conclusory

allegations stating: "plaintiffs have presented the basic facts and law to support the elements of their claim." The brief primarily sought further discovery pursuant to Rule 56(f).[3] In addition, Plaintiffs filed a "Response to Motion of Defendants" which, without analysis, simply concluded that state law claims were not preempted. No filings responded to Defendants' legal arguments.

Further, Plaintiffs filed "exhibits" including an anonymous and altered deposition, and eight volumes of signed employee questionnaires with unsworn and unauthenticated attachments such as payroll forms, newspaper clippings, and individual damages information. Neither the attached affidavits nor the "exhibits" addressed any of Defendants' arguments. Defendants finally requested Rule 11 sanctions.

On May 10, 1990, the district court assigned the matter to a magistrate judge. Subsequently, upon Plaintiffs' request, the Clerk of the District Court issued approximately 800 subpoenas on foreign banks located beyond the jurisdiction of the court. In response, Defendants moved for a protective order and sanctions.

On June 26, 1990, the magistrate judge held a conference and granted Plaintiffs leave until July 15 to file a Third Amended Complaint — presumably to allow Plaintiffs to properly plead ERISA claims. On July 23, Plaintiffs' counsel advised the magistrate judge by letter that he was extending the deadline to amend to August, 15, 1990.[4] Over four months after the original

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3. Although Plaintiffs claimed to need additional discovery to oppose the summary judgment motion, two Plaintiffs indicated in affidavits that they had "knowledge of facts" sufficient to defeat all of GE's claims.

4. The established practice for receiving extensions from this Magistrate was through informal ex parte communications.

deadline, on November 29, 1990, Plaintiffs finally filed their "Motion to Amend for the Third Time." The proposed complaint reitorated earlier allegations and added seven additional counts, four additional Plaintiffs, and thirteen additional Defendants.

The seven new counts alleged ERISA and RICO violations and primarily implicated the members of GE management named as new Defendants. In opposition, Defendants argued the new counts did not arise from the same transaction as the previous counts — the plant closing — and that any evidence necessary to adjudicate the new counts did not overlap with the original evidence.

On December 19, 1990, Defendants filed a motion for summary judgment on the remaining four counts of the First Amended Complaint — counts 1, 2, 3, and 10 which included claims based on § 301 of the LMRA, age discrimination claims under the ADEA and Ohio discrimination law, and a vague ERISA claim. The magistrate judge granted Plaintiffs a sixty day extension to respond. On February 12, 1991, Plaintiffs filed a "response" devoid of any responsive legal arguments save a conclusory statement that the case was not "ripe" for summary judgment. Plaintiffs also requested discovery pursuant to Rule 56(f) and incorporated, by reference, a September 1989 discovery request.

At the end of March 1990, the magistrate judge addressed the above motions within a series of Memorandum Opinions and Reports and Recommendations. The Orders were as follows:

> (1) on March 22, 1991, finding the new counts exceeded the scope of the original lawsuit, the magistrate judge denied Plaintiffs' motion for leave to file a Third Amended Complaint but

granted Plaintiffs thirty days to amend with a state law age discrimination claim;[5]

(2) on March 26, in a very detailed opinion, the magistrate judge denied Plaintiffs' Rule 56(f) motions and granted Plaintiffs thirty days to respond to Defendants' motions for summary judgment;

(3) on March 27, the magistrate judge denied Plaintiffs' motion to disqualify Defendants' counsel;

(4) on April 4, the magistrate judge denied Defendants' motions to strike Plaintiffs' exhibits and affidavits finding the materials were "entirely worthless," and would be ignored, and held Defendants' sanctions motion in abeyance; and

(5) on April 4, the magistrate judge found the class representative inadequate and denied Plaintiffs' motion for class certification, but granted leave to substitute new class representatives within ten days.[6]

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5. The history of Plaintiffs' complaints is helpful. First, the Plaintiffs filed a "First Amended Complaint" after removal. Subsequently, Plaintiffs filed a "Motion to Amend Complaint for the Second Time." This motion was later subsumed by the "Motion to Amend for the Third Time." The magistrate judge denied the motion to amend for the third time except as to an Ohio Age Discrimination claim which was granted conditioned upon clarification of the allegations.

6. This ruling was erroneously issued as a Memorandum Opinion and Order and was later reissued as a Report and Recommendation.

Appendix A

Within each report, the magistrate judge specifically noted any inadequacies of Plaintiffs' pleadings and claims, detailed how to cure such problems, and granted leave to amend accordingly. Specifically, the magistrate judge gave Plaintiffs until April 25, 1991 to file a supplemental response to Defendants' summary judgment motions; until April 15, 1991 to designate new class representatives; and until April 21, 1991 to amend their state age discrimination claim.

On April 16, 1991, Plaintiffs' counsel sought an extension to respond or otherwise "comply" with the issued orders. On April 18, the magistrate judge extended the response time until May 15 and endorsed the letter: "No further extensions will be allowed." On May 15, 1991, the secretary for Plaintiffs' counsel phoned the magistrate judge claiming computer complications and obtained an extension until May 20. On May 20, Plaintiffs' counsel called and wrote to the magistrate judge's chambers alleging a computer virus and informing the magistrate judge that he intended to take an extension until May 27, 1991. On May 28, Plaintiffs' counsel wrote the magistrate judge explaining his residence had been burglarized — with the only property taken being documents and computer disks relevant to this case — and communicating his "requirement to have [until June 27, 1991] to file responses and documents due to this court."

On May 31, 1991, the magistrate judge addressed Plaintiffs' request within a Memorandum Opinion and Order and stated although he was sympathetic to counsel's misfortunes, the nature of the three requested submissions did not warrant the relief requested. The magistrate judge found counsel should have been able to generate such pleadings at the time he originally sought leave to amend the third complaint. Further, the magistrate judge found the summary judgment motions primarily presented questions of law and counsel had known for over ninety days that

he was required to respond without further discovery. The magistrate judge described counsel's behavior as "a classic exercise in foot dragging" and noted that the burglary could not excuse his prior dilatory behavior.

Showing the same leniency and concern for the Plaintiffs as he had throughout the case, however, the magistrate judge granted Plaintiffs a partial extension. Specifically, the magistrate judge imposed "*one further, final, inflexible extension for the filing of all required submissions to June 12, 1991.*" (Emphasis added.) The order also provided that failure to submit responses by June 12 would result in a denial of the motion to amend; a recommendation to grant summary judgment for lack of opposition; and a recommendations to deny class certification *en toto.* June 12 came and went without any response by the Plaintiffs. As promised, on June 27, the magistrate judge recommended: (1) granting summary judgment for lack of opposition; (2) denying Plaintiffs' motion for class certification; and (3) denying Plaintiffs' motion for leave to amend.

On June 28, 1991, Plaintiffs filed three pleadings. The first two consisted of objections to the magistrate judge's rulings, and a motion for class certification without substituting class representatives as required. The third filing was a one page "brief" opposing summary judgment based on Rule 56(f). Within this untimely filing, Plaintiffs argued they previously submitted a consolidated brief, ten volumes of evidence, and a short response which sufficed as responses to Defendants' motions. Plaintiffs "incorporated" the previous filings and referred to various other documents and affidavits. In sum, the Plaintiffs, resting on prior submissions, offered no material issues of fact or legal analysis responding to Defendants' assertions.

Appendix A

On July 10, 1991, Plaintiffs filed a request for reconsideration and modification of orders and objections to the reports and recommendations. Plaintiffs' counsel stated that he was "shocked" by the June 27 order denying leave to amend and alleged he did not receive the May 31 order until July 8 because it had been damaged and delayed in delivery. Plaintiffs' counsel also asserted:

> This Court has issued an Order with a report recommendation that Summary Judgment be granted for Defendants on all counts stating that Plaintiffs have failed to respond and such Motions must "be granted for want of opposition".(sic)
>
> * * *
>
> The Court states further, that "No response to Defendants' Motion was filed by June 12th or to this date".(sic) Plaintiffs object to this ludicrous misstatement of the facts and show of prejudice on behalf of the Court as well as the Courts refusal to consider 10 volumes of evidence that Plaintiffs filed in response to Defendants' Summary Judgment Motions earlier, the Consolidated brief filed 9/11/89, document #86, Response to Summary Judgment filed 9/11/89, document #77, Response to Summary Judgment filed 2/12/91, document #173, and the responses filed the date this Order was issued.

On December 30, 1992, the district court adopted the magistrate judge's recommendations for the denial of leave to amend, denial of class certification and denial of certain of

Defendants' motions. After discussing the dilatory prosecution of the case, and agreeing with the magistrate judge's account of Plaintiffs' contumacious conduct, foot dragging, and failure to comply with numerous deadlines, the district court dismissed the case. The district court also dismissed the Defendants' summary judgment motions and thus did not grant summary judgment for want of opposition. The court stated:

> The Magistrate Judge's position [regarding the dilatory actions of plaintiffs' counsel] is well taken. Procedural rules, although sometimes mechanical, have to be enforced and it is the Judge's responsibility to balance the enforcement of rules with the concern of providing a fair opportunity to be heard and considered on the merits. Plaintiff's (sic) counsel in this case had ample opportunity to be heard and the dilatory management of the case by him cannot be overlooked. Therefore, the Report and Recommendations issued by Magistrate Judge David S. Perelman are adopted and approved and the case is dismissed. All other motions are denied and overruled, including the motion by plaintiff's (sic) to strike defendant's affirmative defenses and the motion of defendants's (sic) to dismiss. The Court will consider reinstating the case, within 30 days of this Order, upon motion by the plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management.

(Emphasis added.)

Thus, the district court gave Plaintiffs yet another chance to complete their filings. On February 25, 1993, the district court denied Plaintiffs' motion to reinstate and dismissed the action. Plaintiffs then filed four notices of appeal. They voluntarily dismissed three notices and this appeal followed.

III. Discussion

Although Plaintiffs raise 25 issues of error[7] on appeal, the only relevant issue before us is whether Plaintiffs' dilatory prosecution of the case warranted dismissal pursuant to Fed.R.Civ.P. 41(b).

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7. The Plaintiffs specifically argue the trial court erred by: (1) erroneously relying upon a local rule in dismissing the case; (2) finding Plaintiffs' objections were untimely; (3) adopting and approving the reports and recommendations concerning summary judgment and (4) dilatory management; (5) refusing to reinstate the case; (6) by adopting and approving the magistrate judge's Report and Recommendation without conducting a careful and complete review of all evidence contained in the record; (7), (8), and (9) failing to conduct a *de novo* review of the magistrate judge's determinations; (10) not considering Plaintiffs' objections filed before the magistrate judge's rulings; (11) adopting the magistrate judge's reports where the Magistrate exceeded his authority; (12) not removing Plaintiffs' counsel to assure adequate representation; (13) adopting the magistrate judge's recommendations concerning plaintiffs' motion alleging defendants' counsel's conflict of interest; (14) denying Plaintiffs' Rule 56(f) motion; (15) denying Plaintiffs' motion to amend their complaint; (16) determining the class representatives were inadequate; (17) denying Plaintiffs' ERISA claim; (18) denying Plaintiffs' motion to amend claim for the third time; (19) denying Plaintiffs' motion for discovery; (20) denying Plaintiffs' motion to correct the record; (21) denying Plaintiffs' motion to compel the deposition of John Welch; (22) denying Plaintiffs' motion to compel interrogatory answers; (23) denying Plaintiffs' motion to disqualify defendants' counsel for conflict of interest; (24) denying Plaintiffs' motion requiring the appearance of John Welch for deposition; and (25) denying the request of a bankruptcy trustee for a defendant to be joined as a party to this suit.

Appendix A

A. The District Court Properly Referred the Case to a Federal Magistrate Judge

Plaintiffs first argue the case was not properly referred to the magistrate judge and that the magistrate judge exceeded the bounds of his jurisdiction over general pre-trial matters by issuing a recommendation about summary judgment. This argument lacks merit. The district court properly referred the matter to the magistrate judge for pre-trial supervision in compliance with 28 U.S.C. § 636. Further, the magistrate judge's reports and recommendations did not exceed his authority. Finally, the district court's review and adoption of the magistrate judge's findings complied with all applicable statutes and local rules. *See, e.g., Applegate v. Dobrovir, Oakes & Gebhardt,* 628 F.Supp. 378 (D. D.C. 1985), *affd,* 809 F.2d 930, *cert. denied,* 481 U.S. 1049 (1987).

B. Dismissal Pursuant to Fed.R.Civ.P 41(b) Was Proper

1. The District Court Did Not Dismiss Based on a Local Rule

Plaintiffs erroneously argue the district court dismissed the case for failure to comply with a local rule requiring the filing of objections within ten days. This is not the case. Although the district court noted a local rule requires filing objections within ten days, the district court did not find Plaintiffs' objections were untimely. Instead, the court dismissed the action based on prior dilatory case management and the failure to comply with the magistrate judge's orders.

2. The District Court Did Not Grant Summary Judgment

Plaintiffs next argue the district court erroneously granted summary judgment for want of opposition without considering responses to Defendants' motions to dismiss. This argument must

fail. Here, the district judge specifically denied Defendants' motions to dismiss and, therefore, did not grant summary judgment for want of opposition.

3. The District Court Properly Dismissed Pursuant to Rule 41(b)

Rule 41(b) of the Federal Rules of Civil Procedure authorizes dismissal "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." The Supreme Court recognized that the inaction or dilatoriness of parties authorizes courts to *sua sponte* dismiss for lack of prosecution. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). The Court further stated that this authority arises from the " 'inherent power,' not vested by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.*

Absent an abuse of discretion, we will not reverse a decision to dismiss pursuant to this rule. *See Little v. Yeutter,* 984 F.2d 160 (6th Cir. 1993). When assessing a Rule 41 dismissal, however, we must balance the district court's need to manage its docket, the public's interest in "expeditious resolution of litigation, and the risk of prejudice to a defendant because the plaintiff has failed to actively pursue its claims," against the policy favoring resolving cases on their merits. *Little,* 984 F.2d at 162 (citations omitted).

Although the Supreme Court specifically noted that the "absence of notice as to the possibility of dismissal" does not "necessarily render such a dismissal void," *Link,* 370 U.S. at 632, we have expressed a preference that notice be given or that clear evidence exists detailing "bad faith and contumacious conduct." *Harris v. Callwood,* 844 F.2d 1254 (6th Cir. 1988). Further, because dismissal is a harsh sanction, we have held that dismissal

is proper only in "extreme situations where there is a showing of a clear record of delay or contumacious conduct by the plaintiff." *Id.* (citing *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991)); *see also Patterson v. Township of Grand Blanc*, 760 F.2d 686, 689 (6th Cir. 1985); and *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980). Without a clear record of delay, we have required the imposition of a lesser sanction.

As the Supreme Court explained, dismissal need not rest on one particular action but a court could reasonably infer a failure to prosecute where "the drawn-out history of the litigation" indicates "that the petitioner had . . . deliberately proceed[ed] in a dilatory fashion." *Link*, 370 U.S. at 633. In *Carter* we discussed what instances amounted to a record of delay and found that

> the key is a failure to prosecute, whether styled as a failure to appear at a pre-trial conference, failure to file a pre-trial statement, failure to prepare for a conference, or failure to comply with the pretrial order.

636 F.2d at 161 (citing J.F. *Edwards Constr. Co. v. Anderson Safety Guard Rail Corp.*, 542 F.2d 1318, 1323 (7th Cir. 1976)).

Similarly, we found a clear record of delay where Plaintiffs' counsel failed to respond to a show cause order, failed to provide the court with his change of address, failed to file necessary documents, and never responded to defendant's motion to dismiss. *See Buck v. Dept. of Agriculture*, 960 F.2d 603, 608 (6th Cir. 1992). We have also held that Rule 41 dismissal is proper where a movant's behavior is intentionally thwarting or shows "a reckless disregard for the effect of its conduct on the proceedings." *See Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 195 (6th Cir. 1986).

Here, the district court gave the Plaintiffs notice their action was in jeopardy. The clear record of delay is undeniable. For over three years, Plaintiffs missed deadlines, filed inadequate motions and responses, and disregarded specific orders from the magistrate judge. After Defendants filed two sets of summary judgment motions, Plaintiffs filed ten volumes of unauthenticated and unreliable documents and short "briefs" lacking responsive arguments. Although the magistrate judge showed considerable patience and tried to guide Plaintiffs in amending their filings, the Plaintiffs never complied with the magistrate judge's suggestions about how to plead a meritorious case.

Finally, after the magistrate judge had granted three extensions based on questionable excuses, he imposed a final, inflexible deadline that Plaintiffs ignored. While we are sympathetic to Plaintiffs' counsel's argument that he never received the magistrate judge's order imposing a final inflexible deadline, this does not excuse his ignorance of the deadline. In fact, the record reflects consistent contact between Plaintiffs' counsel and the magistrate judge's chambers. When counsel did not receive a response to his last extension request, he should have verified his filing deadlines. Regardless, Plaintiffs failed to respond until 16 days after the final deadline.[8]

Plaintiffs engaged in over three years of missed deadlines. Further, the documents Plaintiffs filed were woefully inadequate. Under the circumstances and the history of this case, the dismissal was not an abuse of discretion.[9]

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8. Assuming their response had been timely, these responses were again inadequate.

9. Plaintiffs also argue the district court erred by not reinstating the case. Because the initial dismissal was proper, the failure to reinstate is moot.

Appendix A

III. Conclusion

For the reasons stated above, we AFFIRM the judgment dismissing this action pursuant to Fed.R.Civ.P. 41(b) entered by the Honorable Thomas D. Lambros, United States Chief District Judge for the Northern District of Ohio.

APPENDIX B — PETITION FOR REHEARING *EN BANC* DATED JULY 5, 1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPEAL No. 93-3367

DONALD HAYDOO, individually and on behalf of all other person similarly situated, et al.,

Petitioners,

v.

GENERAL ELECTRIC CO.; JOHN F. WELCH, JR.; INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO; GENERAL ELECTRIC PENSION FUND BOARD,

Respondents.

PETITION FOR REHEARING EN BANC

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Appendix B

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REQUIRED STATEMENTS FOR REHEARING EN BANC

I.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit, *United States v. Shami,* (1985, CA6 Mich) 754 F.2d 670; *Willett v. Wells,* (1977, ED Tenn) 469 F.Supp 748, aff'd without op (CA6 Tenn) 595 F.2d 1227; *Thornton v. Jennings,* (1987, CA6 Ohio) 819 F.2d 153; *Flournoy v. Marshall,* (1988, CA6 Ohio) 842 F.2d 875; and a case were Certification to the Supreme Court of the United States was denied, *Lo Conte v. Dugger,* (1988, CA11 Fla) 847 F.2d 745, cert den (US) 102 L.Ed 2d 386, 109 S.Ct. 397; all of which held that de novo review of portions of magistrate's report to which objection is timely made is both statutorily and constitutionally required; and that consideration by the full court is necessary to secure and maintain uniformity of decisions; with Case Number 93-3367, *Donald Haydoo. et al. v. General Electric. et al.* in that the district court mailed and entered

on its docket January 6, 1993 a ruling dated December 30, 1992 stating:

> "June 27, 1991, Magistrate Judge David S. Perelman signed and filed Report and Recommendations (hereinafter R & R) [*as noted by the docket entry R194. said order was entered on July 1. 1991 the order was not received by plaintiffs' counsel until July 5. 1991*] recommending the denial of plaintiff's class certification motion, denial of plaintiff's leave to file a third amended complaint, and *GRANTING THE SUMMARY JUDGMENT MOTIONS OF DEFENDANTS* [emphasis added, which is very interesting considering that Defendant Union never filed a Summary Judgment Motion]. Such recommendations result in the conclusion of all plaintiff's claims, thus, Magistrate Judge Perelman recommends dismissal of the above-captioned case. . . . Pursuant to Local Rule 5:3.1, *objections must be filed within ten (10) days from the date the parties receive* [emphasis added] the Magistrate Judge's R & R. Plaintiffs filed objections to the R & R dated and filed July 10, 1991. Defendant filed objections July 22, 1991.
>
> The Magistrate Judge's position is well-taken. Procedural rules, although sometimes mechanical, have to be enforced and it is the Judge's responsibility to balance the enforcement of rules with the concern of

providing a fair opportunity to be heard and considered on the merits. Plaintiff's counsel in this case had ample opportunity to be heard and the dilatory management of the case by him cannot be overlooked. *Therefore. the Report and Recommendations issued by Magistrate Judge David S. Perelman are adopted and approved and the case is dismissed* [emphasis added]. All other motions are denied and overruled, including the motion by plaintiff's to strike defendant's affirmative defenses and the motion of defendant's to dismiss. The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management. [This was the only warning given by Judge Lambros that he believed there had been "dilatory management of the case". Plaintiffs through their Counsel filed the required Motion January 12th. They could not certify that all discovery had been completed as that would have been a violation of Rule 11, in that as the record shows Plaintiffs had diligently prosecuted the case to no avail in that they had been in a desperate fight, having filed numerous discovery requests on defendants, sought Case Management Orders from the Court to obtain discovery and resolve delays caused by defendants, tried to compel through legal means the necessary discovery in the hands of the defendants from the inception of

> the case without obtaining the production from defendants, moved to amend their complaint when they learned through discovery from third parties that $15,000,000,000.00 in benefit funds that could not be verified may have effected GE's actions see pages 968-972 of the Joint Appendix.]"

Plaintiffs appealed the District Courts failure to conduct de novo review, and a host of other errors which had stopped Plaintiffs from prosecuting their claims.

This Court then entered a decision stating:

> PER CURIAM. Plaintiffs ("Plaintiffs") appeal the district court's dismissal of their action for failure to prosecute pursuant to Fed.R.Civ.P. 41(b). For the reasons stated below, we AFFIRM the dismissal.
>
> This Court then stated its reasoning including on page 11 of its opinion in this case that:
>
> > . . . the district court did not find Plaintiffs' objections were untimely. . . . [and further states in bold print that]
> >
> > 2. The District Court Did Not Grant Summary Judgment . . .

Clearly the district court says it "adopted and approved" the Magistrate's "Reports and Recommendations", and the Magistrate's Report and Recommendations clearly state that he is

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"*GRANTING THE SUMMARY JUDGMENT MOTIONS OF DEFENDANTS*" as Judge Lambros says they do in his Order adopting them.

This is no easy case at the trial level. GE is a "tough nut to crack". Without discovery, most of which is in the hands of the Defendants, the case is difficult to prove. Defense Counsel has done a good job to confuse the issues and focus attention other than on the case, yet there can be no doubt that the Magistrate in his Report and Recommendations said he is "granting the summary judgment motions of the defendants", that the plaintiffs timely objected, and that the district court adopted the Magistrate's Report and Recommendation without de novo review as required by the law in this Circuit and these United States.

II.

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance:

> Is de novo review of portions of a magistrate's report and recommendations to which timely objection is made, both statutorily and constitutionally required?

Daniel T. Todt, 0033178
Attorney of record for:
Plaintiff-Appellants

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I. DISCUSSION OF COURT OPINION

Monday June 25th Counsel for Plaintiffs received the Order filed June 21st 1994 in the captioned case affirming the dismissal.

Plaintiffs respectfully petition this honorable court for rehearing of this case, the reversal of its decision, and the remand of this case pursuant to: *United States v. Shami,* (1985, CA6 Mich) 754 F.2d 670; *Willett v. Wells,* (1977, ED Tenn) 469 F.Supp 748, aff'd without op (CA6 Tenn) 595 F.2d 1227; *Thornton v. Jennings,* (1987, CA6 Ohio) 819 F.2d 153; *Flournoy v. Marshall,* (1988, CA6 Ohio) 842 F.2d 875; and *Lo Conte v. Dugger,* (1988, CA11 Fla) 847 F.2d 745, cert den (US) 102 L.Ed 2d 386, 109 S.Ct. 397; all of which held that, De novo review of portions of magistrate's report to which objection is timely made is both statutorily and constitutionally required.

This court affirmed dismissal and stated on page 2 of the opinion that:

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> "The matter before this court is whether the district court properly dismissed this case for dilatory case management pursuant to Fed.R.Civ.P.41. We, therefore, must detail the action's four-year procedural history."

Fifteen pages in a brief would not allow a discussion of the procedural history, as the court is well aware that the docket fills pages 1-37B of the Joint Appendix. Points which must be clarified in the Statement of the Case and accepted as correct because there is no de novo review from the district court are:

. pg.1 of opinion "This action arose from [GE's policy of age discrimination, diversion of employee benefit funds to corporate use, shut down of] the Cleveland Equipment Plant ("CEP") [continuation of that same work on the premises through a shell corporation with workers who were bargained with by GE in violation of the collective bargaining agreement and concealment from employee shareholders of a planned "closure" of the facility to deprive them of Plant Closing Benefits]. . . ."

2. pg.2 footnote 2 "Plaintiffs [enumerated were induced to leave and specifically told that the facility would not be closing in the foreseeable future to deprive them of plant closing benefits when in June of 1987 the "closure" was announced and GE knew at the time these men discussed the situation with them and their benefit administrators that the facility was to be "closed"]. . .

3. pg.3-4 This court references a July 24, 1989 filing by GE and its related defendants[1]. As of that point in time Defendants had asked for and received eight extensions of time as shown by the

---

1. No such filing appears on the record as of that date. Plaintiffs assume the court refers to a July 20 filing.

record R14, R18, R27, R31, R33, R38, R44, R47 Plaintiffs had 0. Further Plaintiffs had sought repeatedly to resolve discovery issues and delay of the case by defendants. Discovery sought by Plaintiffs R5, R10, R20, R28, were all delayed for three months or more. Plaintiffs sought to resolve these issues, prosecute their claims and stop the unreasonable delay by defendants by filing a Rule 16 Motion and requesting a Case Management Order R41 filed 6/22/89. All defendants opposed said attempt by plaintiffs. Plaintiffs through Counsel made repeated attempts to obtain discovery and Court intervention to stop the meaningless interference with the proper processing of the case and the obtaining of discovery. Instead of providing discovery defendant GE and its related defendants filed for summary judgment, sanctionable conduct, as explained by Judge Lambros to Plaintiff's Counsel, Appellants' Brief page 15 footnote 1 of the appeal.

In reply to defendants summary judgment motions plaintiffs responded with factual and legal arguments to all positions stated by defendants. However because there was no de novo review this Court has no basis to determine such.

This Court chose to chastise Plaintiffs by taking out of context illustrations presented at the opening of detailed arguments to get the point across. Plaintiffs quote Shakespeare: "A rose by any other name does smell as sweet" as a way to get the point across that GE can call its continuation of business at CEP anything it wants, but it is still GE![2] A cartoon reproduced below which shows exactly, sorry to say what happened to the Plaintiffs.

---

2. Hopefully no one is offended but the way my Constitutional Law professor, now Judge Aldrich said it was that if it walks like a duck, looks like a duck, quacks like a duck and tastes like a duck, its a duck. The same way if you say you are accepting and adopting the Magistrate's Report and Recommendation "granting summary judgment" someone can not come along and say you did something else, nor can you.

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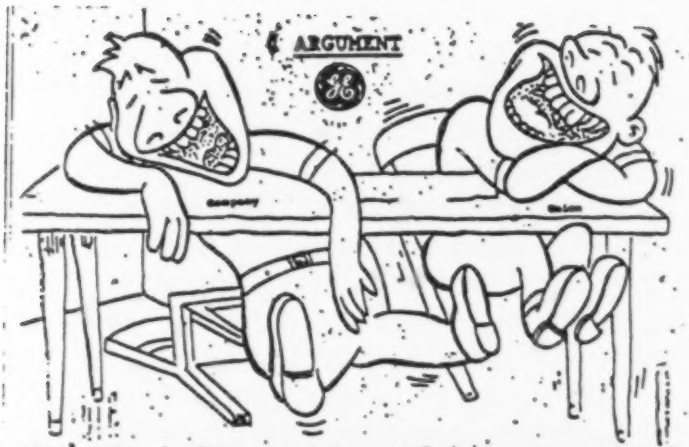

They were wronged by their employer, went to their Union for help and the two of them laughed in their faces, and will continue to unless this court remands this action to the district court and the district court allows the plaintiffs to prosecute their claims.

4. p. 3 Emphasis must be laid on footnote 4 and a further clarification, ie., "just tell me what you need and if I don't tell you otherwise its OK, you don't have to file all this paperwork", is the degree of informality, which made sense under the then circumstances and complicates us to no end now. All timelines were met by Plaintiffs under these informal practices of the Magistrate.

Three reasonable questions haunt the actions taken by GE and arise from what occurs in the "plant closure". Why would they need to be terminating long term employees? Why would GE refuse to pay the employer pension contribution portion to an

employee when he won a grievance through his Union saying he was entitled to it? Why would his Union not do anything further for him, to obtain payment when he had already won the grievance?

Defendants refused to answer any discovery regarding these matters. In reviewing the case as showned by the Affidavits of the plaintiffs GE failed since the inception of ERISA to distribute to their employees the summary annual reports that show what is in the funds, how they are being used and the other statutory requirements of ERISA. With GE's refusal to do so plaintiffs sought and obtained through the financial institutions GE identified in their form 5500 ERISA financial reports filed with the Department of Labor and Treasury the answer. Plaintiffs learned through the "800 subpoenas" which were all responded to with only one institution objecting, that $15,000,000,000.00 in benefit funds that could not be verified may have affected GE's actions see pages 968-972 of the Joint Appendix. As can be seen this is not a foreign institution. Plaintiffs served domestically US institutions that could be served through numerous other district courts, including the District Court in New York. Co-counsel for Plaintiffs identified on many of the subpoenas served outside the US as well as a network plaintiffs' Counsel had, which were able to get the cooperation and response of these institutions without going through the separate jurisdictions of each of their respective countries. Putting it simply, plaintiffs through their Counsel saved horrendous time, cost and delay, and is by this court having it said that this somehow establishes dilatory conduct. In fact it was just the opposite.

The court then points out on page 4 that "Defendants moved for a protective order and sanctions", as they did with a lengthy brief asking for a few hundred thousand dollars. The Court of course denied the protective order motions because none of the

discovery sought by the subpoenas had been sought from defendants and they had no legal basis to seek either a protective order or sanctions as shown in R131, R133 and R134. The very points the court sights as plaintiffs improper actions are as can be seen the improper actions of the defendants.

5. pg.5 The Court characterizes benefit claims and the adding of the benefit funds as dilatory tactics of the plaintiffs. As stated in the original Complaint plaintiffs named the known defendants and pursuant to Common Law pleading practices put the court and all parties on notice that there were in addition to the named defendants other "UNKNOWN DEFENDANTS". Something was wrong with the benefit funds. That was clear with the refusal to pay the employer contribution of the pension to the employee who had won the grievance. GE took the position that the individual benefit funds had to be joined for any claims that plaintiffs had regarding GE not paying monies into the funds or improperly using the funds. Plaintiffs rather than arguing the point sought to join the benefit funds. GE then opposed such. Who is being dilatory?

The evidence available to Plaintiffs at present shows that the defendants failed to provide the summary annual reports to plaintiffs, that the financial institutions claimed by GE to have dealt with the funds do not know anything about it, GE refuses to answer any questions on the subject, and GE had failed to provide the statements which is a criminal violation as plead, establishing the RICO claims. Plaintiffs sought to prosecute their claims as confirmed by the court's acknowledgment of these filings. They did this as soon as they had reasonable evidence to meet the Rule 11 standard, without delay. Again plaintiffs ask who has failed to prosecute their claims and participated in dilatory tactics? Again plaintiffs seek the court's action to move this case forward!

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6. pgs.9 and 11-12 The court misapprehends the facts when it states on pg.9 that:

> "On December 30, 1992, the district court adopted the magistrate judge's recommendations for the denial of leave to amend, denial of class certification and denial of certain of Defendants' motions. . . . The district court also dismissed the Defendants' summary judgment motions and thus did not grant summary judgment for want of opposition. [emphasis added as this is specifically what the district court *did not do* as stated below]. . . "

The court then states its reasoning on pgs.11-12 regarding rule 41 and that it states summary judgment was not granted in spite of the specific wording of the district court saying it was.

> "B. Dismissal Pursuant to Fed.R.Civ.P 41(b) Was Proper
>
> 1. The District Court Did Not Dismiss Based on a Local Rule
>
> . . . the district court did not find Plaintiffs' objections were untimely [IF THEY WERE NOT UNTIMELY DE NOVO REVIEW IS MANDATORY!]. Instead, the court dismissed the action based on prior dilatory case management and the failure to comply with the magistrate judge's orders.

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2. The District Court Did Not Grant Summary Judgment

> Plaintiffs next argue the district court erroneously granted summary judgment for want of opposition without considering responses to Defendants' motions to dismiss [Magistrate Perlman specifically stated that the summary judgment motions of defendants were granted for lack of opposition without discussion of the merits of plaintiffs arguments and in his REPORT AND RECOMMENDATION THAT WAS timely objected to and "APPROVED AND ADOPTED" by the district court without de novo review]. . . . This argument must fail. Here, the district judge specifically denied Defendants' motions to dismiss and, therefore, did not grant summary judgment for want of opposition."

Plaintiffs agree the court denied all other motions which would include all of defendants' motions to dismiss. Obviously a motion to dismiss is not a summary judgment motion as the court is careful to avoid saying the summary judgment motion was denied and states only as plaintiffs agree that the motions to dismiss were denied.

What Judge Lambros and Magistrate Perlman stated is again presented below:

> "June 27, 1991, Magistrate Judge David S. Perelman signed and filed Report and

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Recommendations (hereinafter R & R) [*as noted by the docket entry R194, said order was entered on July 1, 1991 the order was not received by plaintiffs' counsel until July 5, 1991*] recommending the denial of plaintiff's class certification motion, denial of plaintiff's leave to file a third amended complaint, and *GRANTING THE SUMMARY JUDGMENT MOTIONS OF DEFENDANTS* [emphasis added, which is very interesting considering that Defendant Union never filed a Summary Judgment Motion]. Such recommendations result in the conclusion of all plaintiff's claims, thus, Magistrate Judge Perelman recommends dismissal of the above-captioned case. . . . Pursuant to Local Rule 5:3.1, *objections must be filed within ten (10) days from the date the parties receive* [emphasis added] the Magistrate Judge's R & R. Plaintiffs filed objections to the R & R dated and filed July 10, 1991. Defendant filed objections July 22, 1991.

The Magistrate Judge's position is well-taken. Procedural rules, although sometimes mechanical, have to be enforced and it is the Judge's responsibility to balance the enforcement of rules with the concern of providing a fair opportunity to be heard and considered on the merits. Plaintiff's counsel in this case had ample opportunity to be heard and the dilatory management of the case by him cannot be overlooked. *Therefore. the Report*

and Recommendations issued by Magistrate Judge David S. Perelman are adopted and approved and the case is dismissed [emphasis added]. All other motions are denied and overruled, including the motion by plaintiff's to strike defendant's affirmative defenses and the motion of defendant's to dismiss. The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management. [This was the only warning given by Judge Lambros that he believed there had been "dilatory management of the case". Plaintiffs through their Counsel filed the required Motion January 12th. They could not certify that all discovery had been completed as that would have been a violation of Rule 11, in that as the record shows Plaintiffs had diligently prosecuted the case to no avail in that they had been in a desperate fight, having filed numerous discovery requests on defendants, sought Case Management Orders from the Court to obtain discovery and resolve delays caused by defendants, tried to compel through legal means the necessary discovery in the hands of the defendants from the inception of the case without obtaining the production from defendants, moved to amend their complaint when they learned through discovery from third parties that $15,000,000,000.00 in benefit

funds that could not be verified may have effected GE's actions see pages 968-972 of the Joint Appendix, ATTACHED HERETO FOR THE CONVENIENCE OF THE COURT AS APPENDIX "A".]"

II. ARGUMENT

As this court stated in applying Rule 41 in its cite to *Link v. Wabash Railroad Co.,* 370 U.S. 626 (1962) "the key is failure to prosecute". Plaintiffs did not fail. Were they up against tough competition? Yes! Were they maneuvered into arguing motions and disputes that stopped the orderly discovery process when plaintiffs could not get court intervention with their motions to compel and requests for a case management conference? Yes! Was there unnecessary discovery by the plaintiffs that in any way delayed the case? No. Did any of the Plaintiffs themselves refuse to participate in the discovery process in any way? No!

Furthermore, the accusation of "dilatory case management" is particularly ironic when it was the Petitioners who requested a "Case Management Agreement" be entered pursuant to F.R.C.P. 16, as is standard procedure before Judge Lambros. (R. 41 MEMORANDUM & R. 46 LETTER from pltf atty). It becomes even more ironic when one considers that the defendants *opposed* such a motion at the district level! GE Pension Board as well as Defendant IUE *opposed* Plaintiffs' motion for a case management agreement on June 6 & 7, 1989 (R. 48 MOTION & R. 49 BRIEF by defts G.E.) as well as plaintiffs later efforts. It is fully absurd that Defendant-Appellees should oppose such motion as they did, and then benefit for their delay tactics.

Although plaintiffs fully dispute that they or their counsel

ever failed to prosecute their case with due diligence it is clear from this court's ruling that although plaintiffs were prosecuting their case diligently at the time of dismissal that the court believes that the district court did not "adopt and approve" the summary judgment as stated in the Magistrate's Report and Recommendation, but "Instead, the court dismissed the action based on prior dilatory case management", page 11 of opinion. Even if this somehow can be stretched and gotten from the district court decision it is legally wrong as stated in *United States v. Meyers*, 38 FRD 194, 9 FR Serv 2d 41b.11, Case 6 (1964) "Where plaintiff is presently prosecuting his claim with reasonable diligence, action cannot be dismissed because at some earlier time plaintiff failed to act with diligence."

Finally on the point of dismissal it must be argued that the conduct complained of and discussed as warranting the drastic sanction of dismissal has nothing to do with the conduct of any of the plaintiffs, but even if correct relates only to the actions of counsel. A District Court abuses its discretion in dismissing a complaint with prejudice for failure to prosecute where there is no indication that the plaintiff has been involved in the noncompliance, *Haley v. Kansas City Star*, 761 F2d 489, 1FR Serv 3d 1076 (CA 8 1985).

III. CONCLUSION

As noted above no indication of noncompliance on plaintiffs part is even given lip service, as was no reference to any current lack of due diligence. On the contrary the December 30 order shows the true nature of the case with the Report and Recommendations issued by the Magistrate on July 1st, 1991 the plaintiffs timely filing objections on July 10th, 1991, the defendants filing untimely objections on July 22nd, 1991, and, the

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Court not ruling until December 30th, 1992 applying a nonapplicable local rule of court and if this court is correct sanctioning plaintiffs for what it claims occurred more than a year and one half prior to judgment in spite of plaintiffs having filed motions for discovery and made repeated renewed requests for a case management conference.

For the above stated reasons plaintiffs respectfully pray that this honorable Court modify its earlier Judgment Affirming the dismissal by the District Court; that the decision of the District Court dismissing the case be reversed; that the case be remanded to the District Court; with the further order that the plaintiffs within ten (10) days of remand, submit an amended complaint, that the parties, within thirty days of remand, submit a proposed Case Management Plan to Judge Lambros, containing an expidited calender to complete all discovery, that the parties through their respective Counsel meet with the Court for a Case Management conference to resolve any remaining disputes within seven (7) days of submission of the proposed Case Management Plan and that the case be resolved or prepared for trial within 180 days of the District Court's entering a Case Management Order.

Respectfully submitted,

DANIEL T. TODT & ASSOCIATES

s/ Daniel T. Todt
Daniel T. Todt 0033178
20th Floor, The Standard Bldg.
1370 Ontario Street
Cleveland, Ohio 44113-1701
(216) 363-6044
Attorney for Petitioners

Appendix B

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Rehearing was served upon John Meredith of SQUIRE, SANDERS & DEMPSEY, 4900 Society Center, 1270 Public Square, Cleveland, Ohio 44114-1304, attorney for Defendants Welch, General Electric Company, and General Electric Pension Board, and Mark A. Rock of SCHWARZWALD & ROCK, 616 Bond Court Building, 1300 East 9th Street, Cleveland, Ohio 44114, and James G. Mauro, Jr., International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, 1126 Sixteenth St., N.W., Washington, D.C. 20036-4866, Attorneys for Defendant Union by regular U.S. Mail this ___ day of July, 1994.

s/ Daniel T. Todt
Daniel T. Todt

Appendix B

CITICORP • CITIBANK

Citibank, N.A.
A subsidiary of
Citicorp
425 Park Avenue
New York, NY
10043

Thomas M. Lahiff, Jr.
Vice President

October 23, 1990

Daniel T. Todt, Esq.
Daniel T. Todt & Associates
20th Floor
The Standard Building
1370 Ontario
Cleveland, Ohio 44113

Re: Haydoo v. General Electric (Deposition Subpoenas)

Dear Mr. Todt:

In response to a series of subpoenas that you caused to be served in the above-captioned litigation, I have communicated with all of the Citibank affiliates listed in the attachment to your letter to me of June 27, 1990. I have also undertaken a search of the records of Citibank, N.A. in response to the subpoena served on August 2, 1990. As I told you in our conversation on October 16, 1990, I have been unable to locate any documents responsive to your subpoenas.

If you could provide me with any additional information about the accounts described in those subpoenas, such as account numbers or relationship managers, I would be willing to renew the search.

Very truly yours,
s/ illegible
TML/ls

Appendix B

1987
GENERAL ELECTRIC MASTER RETIREMENT TRUST
FORM 5500 ANNUAL RETURN/REPORT
TRANSACTIONS OR SERIES OF TRANSACTIONS IN EXCESS OF 3% OF THE CURRENT VALUE OF PLAN ASSETS

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix B

1987

GENERAL ELECTRIC INSURANCE PLAN TRUST FORM 5500 ANNUAL RETURN/REPORT TRANSACTIONS OR SERIES OF TRANSACTIONS IN EXCESS OF 3% OF THE CURRENT VALUE OF PLAN ASSETS

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix B

1987

GENERAL ELECTRIC MEDICAL CARE TRUST FOR PENSIONERS FORM 5500 ANNUAL RETURN/REPORT TRANSACTIONS OR SERIES OF TRANSACTIONS IN EXCESS OF 3% OF THE CURRENT VALUE OF THE PLAN

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix B

1987

GENERAL ELECTRIC EMERGENCY AID PLAN FORM 5500 ANNUAL RETURN/REPORT TRANSACTIONS OR SERIES OF TRANSACTIONS IN EXCESS OF 3% OF THE CURRENT VALUE OF PLAN ASSETS

(Omitted Here But Submitted Separately As Lodging Appendix)

APPENDIX C — ORDER DENYING PETITION FOR REHEARING *EN BANC* DATED AUGUST 1, 1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3367

DONALD HAYDOO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, ET AL.,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC COMPANY; JOHN F. WELCH, JR.; INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL SALARIED AND MACHINE WORKERS, AFL-CIO; GENERAL ELECTRIC PENSION FUND BOARD,

Defendants-Appellees.

ORDER

BEFORE: KEITH and SUHRHEINRICH, Circuit Judges; and JOINER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

---

* Hon. Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk pe

APPENDIX D—ORDER DENYING PLAINTIFFS' MOTION TO REINSTATE THE CASE DATED FEBRUARY 25, 1993

UNITED STATES DISTRIC COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:89CV0170

DONALD HAYDOO, *et al.*,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, *et al.*,

Defendants.

ORDER

THOMAS D. LAMBROS, CHIEF JUDGE

On December 30, 1992, this Court signed a Memorandum Opinion and Order adopting and approving Magistrate Judge David S. Perelman's Report and Recommendations, thus dismissing and terminating the case. In that Order this Court wrote that it would consider reinstating the case upon a motion "ceretifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management." Thereafter, a Motion to Reinstate & Certification was filed.

In that motion, Rebecca L. Todt stated that all briefing "to date" has been complete, and that "they have complied with all discovery requests presented to them." Ms. Todt also requests that this Court take notice that she "will temporarily assume the position of lead counsel" because of the "extensive time restraints

on Daniel T. Todt." Further, Ms. Todt certifies that in the future all "times-lines established for case management will be met by the plaintiffs. . ."

After careful consideration, this Court denies the motion for reinstatment. This Court in the Order of December 30, 1992, held that "[p]laintiff's counsel in this case had ample opportunity to be heard and the dilatory management of this case cannot be overlooked." Seeing that Mr. Todt, as lead counsel, cannot make the commitments or sign the certification, the motion for reinstatement must be denied. Accordingly, a judgment is entered.

IT IS SO ORDERED.

s/ Thomas D. Lambros
Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 2/25/93

APPENDIX E — SUMMONS PAGE OF COMPLAINT FILED IN THE COURT OF COMMON PLEAS, ON DECEMBER 28, 1988

COURT OF COMON PLEAS, CUYAHOGA
COUNTY COURT HOUSE
Cleveland, Ohio 44113

Rule 4 (B) Ohio
Rules of Civil Procedure

SUMMONS IN A CIVIL ACTION

CASE NO. 88-0162390-CV DO1 CA 412-43142

SUMMONS

HAYDOO, DONALD-INDIV. ON BEHALF OF 100 WORKERS-ETC. ET AL

Plaintiff

VS

GENERAL ELECTRIC CO.

Defendant

GENERAL ELECTRIC CO. FAIRFIELD, CONN. -06431

You have been named defendant in a complaint (copy attached hereto) filed in Cuyahoga County Court of Common Pleas, Cuyahoga County Court House, Cleveland, Ohio 44113, by the plaintiff named herein.

You are hereby summoned and required to answer the complaint within 28 days after service of this summons upon you, exclusive of the day of service.

Appendix E

Said answer is required to be served on:

Plaintiff's Attorney
TODT, DANIEL T.
20TH FLOOR, STANDARD BLDG.
1370 ONTARIO
CLEVELAND, OHIO 44113

Case has been assigned to Judge:
MCGRATH, JAMES J.
Do not contact judge.
Judges name is given for attorney's reference only.

Said answer is required to be served on Plaintiff's Attorney (Address denoted by arrow at left.)

Your answer must also be filed with the court within 3 days after service of said answer on plaintiff's attorney.

If your fail to do so, judgment by default will be rendered against you for the relief demanded in the complaint.

DATE
JAN. 05, 1989

GERALD E. FUERST
Clerk of the Court of Common Pleas

s/ M. Connelly
Deputy

[Seal]
THE GREAT SEAL
OF THE COUNTY OF CUYAHOGA

SERVICE COPY

APPENDIX F — NOTICE OF REMOVAL OF COMPLAINT DATED JANUARY 27, 1989

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. 162390

JUDGE McGRATH

DONALD HAYDOO, et al.,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al.,

Defendants.

NOTICE OF REMOVAL

Now come defendants, General Electric Company (sued herein in its own name and as "The Pension Board of the General Electric Pension Fund"), John F. Welch, Jr. (sued herein as "Jack Welch"), International Union of Electronic, Electrical, Salaried, machine and Furniture Workers, AFL-CIO (named herein and formerly known as the International Union of Electrical, Technical, Salaried and Machine Workers, hereinafter "IUE"), and in accordance with 28 U.S.C. § 1446, herewith files with the clerk of this Court a copy of its Petition of Removal, attached hereto, which Petition was filed in the United States District Court for the Northern District of Ohio, Eastern Division, on this 27th day of January, 1989.

Appendix F

Respectfully submitted,

s/ John T. Meredith
JOHN T. MEREDITH
Squire, Sanders & Dempsey
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Defendants
General Electric Company,
John F. Welch and General
Electric Pension Board

s/ Richard F. Rice
RICHARD F. RICE
3461 Office Park Drive
Kettering, Ohio 45439-2294

Attorney for Defendant I.U.E.

Appendix F

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Removal was sent by regular first class U.S. Mail this 27th day of January, 1989 to Daniel T. Todt and Rebecca L. Todt, Suite 200, Standard Building, Cleveland, Ohio 44113-1701, Attorneys for Plaintiffs.

s/ illegible
One of the Attorneys for Defendants

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.

JUDGE

DONALD HAYDOO, et al.,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al.,

Defendants.

PETITION FOR REMOVAL BY GENERAL ELECTRIC COMPANY, JOHN F. WELCH, AND THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL-CIO, AND GENERAL ELECTRIC PENSION BOARD

TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO;

All defendants herein, the General Electric Company (sued herein in its own name and as "The Pension Board of the General Electric Pension Fund"), John F. Welch, Jr. (sued herein as "Jack Welch"), and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (named herein and formerly known as the "International Union of Electrical, Technical, Salaried and Machine Workers", hereinafter

"IUE"), petitioners, respectfully represent to this Court as follows:

1. On December 28,1988, plaintiff commenced an action against petitioners in the Common Pleas Court, Cuyahoga County, Ohio, entitled *Donald Haydoo, et al. plaintiffs v. General Electric Company, et al.*, defendants, Case No. 162390 by the filing of a Summons and Complaint, copies of which are attached . . .

* * *

5. Petitioner IUE is a labor organization headquartered in Washington, D.C. One of its locals, Local 707, maintained its office at 800 E. 152 St., Cleveland, Ohio, until November 1988, and now maintans an office at 18975 Villaview Road, Cleveland, Ohio 44119.

6. The above-entitled action is a civil action of which this Court has original jurisdiction pursuant to Title 28 U.S.C. § 1331 and is one which may be removed to this Court by petitioners pursuant to the provisions of 28 U.S.C. § 1441, in that it appears from plaintiff's Complaint that this Court has original jurisdiction, without regard to amount in controvesy, under the provisions of the National Labor Relations Act, 29 U.S.C. § 151 et. seq. ("NLRA"); Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185a ("LMRA"); the Age Discrimination in Employment Act, 29 U.S.C. § 626 ("ADEA"); and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA").

7. Plaintiffs' Complaint contains ten counts, all relating to the December 1987 closing of defendant General Electric Company's Cleveland Equipment Plant, where plaintiffs had been employed. Count One attempts to state a claim against defendant General

Electric Company for violation of its collective bargaining agreement with defendant IUE and for violation of the "intent and purpose" of the LMRA. Count Two asserts that defendant IUE breached its federal statutory duty of fair representation. Count Three asserts that the closing of the Cleveland Equipment Plan "discriminated against employees protected by the Federal Age Discrimination in Employment Act of 1967." Count Four attempts to state a promissory estoppel claim against defendant General Electric Company. Counts Five, Six and Eight attempt to assert claims for interference with contract, fraud, and "outrageous" conduct against defendants General Electric Company and/or Welch. Count Seven asserts that defendants IUE and General Electric Company failed to carry out their responsibilities under the collective bargaining agreement. Count Nine asserts damages from defendants' actions. Finally, in Count Ten plaintiffs assert they "doubt" defendant General Electric's compliance with ERISA because of alleged failure to provide benefits information. (Defendants maintain state claims are preempted by ERISA and/or federal labor law; in addition, the Court has pendent jurisdiction.)

8. Petitioners will file their Answers and/or Rule 12 motions within the time permitted by statute and rules, and said Petitioners have good and sufficient defenses to the claims of plaintiffs.

9. The filing of this Petition for Removal is timely in that it is filed within the time period required under 28 U.S.C. § 1446.

10. Petitioners will give written notice of the filing of this Petition to all adverse parties as required by 28 U.S.C. § 1446(e) and will file a copy of this Petition with the Clerk of the Court of Common Pleas of Cuyahoga County, Ohio as further required by that section.

Appendix F

WHEREFORE, PETITIONERS pray that the above action now pending against it in the Court of Common Pleas of Cuyahoga County, Ohio be removed to this Court.

Respectfully submitted,

s/ John T. Meredith
JOHN T. MEREDITH
Squire, Sanders & Dempsey
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Defendants
General Electric Company,
John F. Welch and General
Electric Pension Board

s/ Richard F. Rice
Richard F. Rice
3461 Office Park Drive
Kettering, Ohio 45439-2294

Attorney for Defendant Union

Appendix F

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Removal by General Electric Company, John F. Welch, and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, and General Electric Pension Board was sent by regular first class U.S. Mail this 27th day of January, 1989 to Daniel T. Todt and Rebecca L. Todt, Suite 200, Standard Building, Cleveland, Ohio 44113-1701, Attorneys for Plaintiffs.

s/ illegible
One of the Attorneys for Defendants

Appendix F

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

VERIFICATION

JOHN T. MEREDITH, being first duly sworn according to law, deposes that he is the duly authorized attorney for the General Electric Company, a corporation; The Pension Board of the General Electric Pension Fund; and John F. Welch, Jr., an individual; that he is authorized to make this verification on behalf of said parties; that he has read the foregoing Petition for Removal; that it is true as he verily believes.

s/ John T. Meredith
JOHN T. MEREDITH

SWORN TO BEFORE ME and subscribed in my presence this 27th day of January, 1989.

s/ Nancy J. Plosker
Notary Public
Nancy J. Plosker
Notary Public, State of
Ohio, Cuyahoga County
My Commission Expires June 8, 1992

Appendix F

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

VERIFICATION

RICHARD F. RICE, being first duly sworn according to law, deposes that he is the duly authorized attorney for International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, a labor organization; that he is authorized to make this verification on behalf of said organization; that he has read the foregoing Petition for Removal; that it is true as he verily believes.

s/ Richard F. Rice
RICHARD F. RICE

SWORN TO BEFORE ME and subscribed in my presence this 25th day of January, 1989.

s/ illegible
Notary Public

APPENDIX G — MEMORANDUM OPINION AND ORDER DISMISSING THE CASE DATED DECEMBER 30, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:89CV0170

DONALD HAYDOO, *et al.*,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

THOMAS D. LAMBROS, CHIEF JUDGE

June 27, 1991, Magistrate Judge David S. Perelman signed and filed Report and Recommendations (hereinafter R & R) recommending the denial of plaintiff's class certification motion, denial of plaintiff's leave to file a third amended complaint, and granting the summary judgment motions of defendants. Such recommendations result in the conclusion of all plaintiff's claims, thus, Magistrate Judge Perelman recommends dismissal of the above-captioned case. In these R & R's, Magistrate Judge Perelman incorporates by reference certain rulings, Orders, and Reports and Recommendations, all filed between March and May, 1991. Pursuant to Local Rule 5:3.1, objections must be filed within ten (10) days from the date the parties receive the Magistrate

Appendix G

Judge's R & R. Plaintiffs filed objections to the R & R dated and Filed July 10, 1991. Defendant filed objections July 22, 1991.

The Magistrate Judge's position is well-taken. Procedural rules, although sometimes mechanical, have to be enforced and it is the Judge's responsibility to balance the enforcement of rules with the concern of providing a fair opportunity to be heard and considered on the merits. Plaintiff's counsel in this case had ample opportunity to be heard and the dilatory management of the case by him cannot be overlooked. Therefore, the Report and Recommendations issued by Magistrate Judge David S. Perelman are adopted and approved and the case is dismissed. All other motions are denied and overruled, including the motion by Plaintiff's to strike defendant's affirmative defenses and the motion of defendant's to dismiss. The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all times-lines established for case management.

IT IS SO ORDERED.

s/ Thomas D. Lambros
Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: December 30, 1992

APPENDIX H — REPORT AND RECOMMENDATION ISSUED BY THE MAGISTRATE JUDGE ON JUNE 27, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:89CV0170

Magistrate Judge David Perelman

Chief Judge Thomas D. Lambros

Donald Haydoo, et al.,

Plaintiffs

v.

General Electric Co., et al.

Defendants

REPORT & RECOMMENDATION

On March 26, 1991 this Court entered a Memorandum Opinion and Orders pertaining to "defendants' separately filed motions for summary judgment on Counts Four through Nine [filed July 20, 1988] and on Counts One through Three and Ten [filed December 19, 1990] of plaintiffs' first amended complaint, and plaintiffs' responses thereto seeking leave, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, to pursue further discovery before responding to the merits of defendants' motions." Therein this Court held that "the plaintiffs have failed to

demonstrate to this Court that any of the discovery requested pursuant to Federal Rules of Civil Procedure 56(f) is necessary to oppose the defendants' motions for summary judgment," and "grant[ed] the plaintiffs thirty (30) days to file a response to the defendants' motions for summary judgment."

Thereafter plaintiffs' counsel requested, and was granted, a number of extensions to file that response.

On May 28, 1991 plaintiffs' counsel, by way of letter, requested a further thirty (30) day extension. On May 31st this Court denied that request, and granted "one further, final, inflexible extension to June 12, 1991" for filing of plaintiffs' response to defendants' motions. In that ruling, a copy of which is appended hereto, this Court further stated that "If response to defendants' motions for summary judgment is not submitted by that date a Report and Recommendation will be submitted to Chief Judge Lambros recommending that such motions be granted for want of opposition."

No response to defendants' motions was filed by June 12th, or to this date.

Consistent with this Court's ruling of May 31, 1991, it is hereby recommended that defendants' motions for summary judgment be granted for want of opposition.[1] Such judgment will conclude all claims for relief asserted in the amended complaint, and will result in termination of the action.

---

1. Transmitted herewith are the said motions and plaintiffs' submissions pertinent thereto, and the Memorandum Opinion and Order of March 26, 1991.

Appendix H

s/ David S. Perelman
DAVID S. PERELMAN
United States Magistrate Judge

DATED: June 27, 1991

APPENDIX I — REPORT AND RECOMMENDATION ISSUED BY THE MAGISTRATE JUDGE ON JUNE 27, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:89CV0170

Magistrate Judge David Perelman

Chief Judge Thomas D. Lambros

Donald Haydoo, et al.,

Plaintiffs

v.

General Electric Co., et al.

Defendants

REPORT & RECOMMENDATION

On April 5, 1991 this Court entered a Memorandum Opinion and Order, provisionally denying plaintiffs' motion to certify this action as a class action. That order called upon plaintiffs to take certain steps, within ten (10) days thereof, before a final determination was entered.

Thereafter plaintiff's counsel secured a number of extensions to take the required action.

In response to a last request for a further thirty (30) day

extension, made by way of letter received by this Court May 28, 1991, this Court denied such request. Rather, in a ruling entered May 31, 1991, this Court granted "one further, final inflexible extension for the filing of all required submissions to June 12, 1991," and stated that "If the supplement to the motion for class certification is not submitted by that date this Court's Memorandum Opinion and Order relevant thereto will be reissued as a Report and Recommendation to Chief Judge Lambros[1] recommending that the motion for class certification be denied *in toto*."

No supplement to plaintiffs' motion was received by June 12th, or to this date.

Consistent with this Court's ruling of May 31st, the Memorandum Opinion and Order of April 5, 1991 is adopted as a Report and Recommendation (and is incorporated by reference herein and transmitted herewith),[2] and it is recommended that, for the reasons stated therein, plaintiffs' "Motion To Certify Classes Of Plaintiffs Under Federal Rules Of Civil Procedure 23 and 23.1 And The ADEA Pursuant To Federal Rule of Civil Procedure 23(c)(1)" be denied *in toto*.

s/ David S. Perelman
DAVID S. PERELMAN
United States Magistrate Judge

DATED: June 27, 1991

---

1. As stated in that ruling, subsequent to entry of the decision of April 5th this Court realized that under 28 U.S.C. § 136(b) any determination on a motion seeking declaration of class status must be entered by way of an R & R.

2. A copy of this Court's ruling of May 31, 1991 is also transmitted herewith. Also transmitted are the briefs relevant to the motion to certify.

Appendix I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:89CV0170

Magistrate Judge David Perelman

Chief Judge Thomas D. Lambros

Donald Haydoo, et al.,

Plaintiff

v.

General Electric Co., et al.,

Defendant

ORDER

PURSUANT TO this Court's Memorandum Opinion and Order of May 31, 1991,

IT IS HEREBY ORDERED that plaintiff's motion for leave to file a Third Amended Complaint is denied.

s/ David S. Perelman
DAVID S. PERELMAN
United States Magistrate Judge

DATED: June 27, 1991

APPENDIX J — PLAINTIFFS' MOTION TO REINSTATE DATED JANUARY 12, 1993

UNITED STATES DISTRICT COURT
NORTHERN DIVISION OF OHIO

Case No. 1:89:CV0170

Judge Thomas D. Lambros

DONALD HAYDOO, et al.,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al.,

Defendants.

Plaintiffs' Motion to Reinstate & Certification

Now come the plaintiffs, by and through counsel, and hereby move this Court to reinstate this case pursuant to this Court's Memorandum Opinion and Order dated December 30, 1992. The Plaintiffs hereby certify to this Court that all briefing to date has been completed, and that they have complied with all discovery requests presented to them. Plaintiffs request that this Court take notice that as of this date, Rebecca L. Todt will temporarily assume the position of lead counsel in this case due to international commitments that have arisen placing extensive time restraints on Daniel T. Todt. Therefore, with the affixing of her signature below, Rebecca L. Todt hereby certifies to this Court that in the future all time-lines established for case management will be met by the Plaintiffs and that procedures will be established to ensure that similar situations will not occur in the future.

Appendix J

Respectfuly submitted,
DANIEL T. TODT & ASSOCIATES

s/ Rebecca L. Todt
Daniel T. Todt #0033178
Rebecca L. Todt #0033167

Certification of Service

A copy of the foregoing Plaintiffs' Motion to Reinstate & Certification was served upon John Meredith of SQUIRE, SANDERS & DEMPSEY, 4900 Society Center, 1270 Public Square, Cleveland, Ohio 44114-1304, attorney for Defendants Welsch, General Electric Company, and General Electric Pension Board, and Mark A. Rock of SCHWARZWALD & ROCK, 616 Bond Court Building, 1300 East 9th Street, Cleveland, Ohio 44114, and Robert Friedman and James G. Mauro, Jr., International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, 1126 Sixteenth St., N.W., Washington, D.C. 20036-4866, Attorneys for Defendant Union by regular U.S. Mail this 12th day of January, 1993.

s/ Rebecca L. Todt
Rebecca L. Todt

APPENDIX K — JOINT BRIEF OF ALL DEFENDANTS IN OPPOSITION TO MOTION TO REINSTATE DATED JANUARY 22, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:89 CV 0170

JUDGE LAMBROS

DONALD HAYDOO, et al.,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al.,

Defendants.

JOINT BRIEF OF ALL DEFENDANTS IN OPPOSITION TO PLAINTIFFS MOTION TO REINSTATE AND CERTIFICATION

All defendants join in this brief and respectfully submit that plaintiffs' request to reinstate this action to the docket should be denied.

Plaintiffs' "certification", which plaintiffs' lead counsel did not sign, consists of a vague assurance of future compliance, coupled with the acknowledgment that lead counsel will be "temporarily" unavailable to participate in this action due to *unspecified* "international commitments". Such general

representatlons cannot overcome or excuse the long pattern of dilatory and improper conduct which led the Magistrate and this Court to dismiss this case in the first instance.

This case has a long and unusual history. The most recent chapters are briefly summarized in the June 27, 1991, Order of Magistrate David Perelman, recommending dismissal of this case due to plaintiffs' counsel's repeated failures to meet Court-established deadlines and comply with applicable Court procedures.

Briefly, the case was filed in December 1988 and removed to this Court in January 1989. Defendants General Electric, Pension Board and Welsh filed summary judgment motions on June 30, 1989 and December 19, 1990. Instead of filing briefs in opposition, plaintiffs filed a series of motions, seeking additional discovery, amendment of the complaint, class certification and disqualification of defendants' counsel. Defendants responded to these motions and further filed motions for sanctions under 28 U.S.C. Section 1927, and Rules 11 and 28(g) of the Federal Rules of Civil Procedure.

In late March and early April, 1991, Magistrate Perelman filed a series of Orders, ruling on various pending matters and establishing clear, specific deadlines for further action by plaintiffs' counsel. After numerous extensions, Plaintiffs' counsel failed to meet these deadlines, and on June 27, 1991, the Magistrate issued a Report and Recommendation dismissing the action for want of prosecution. The Magistrate succinctly summarized the basis for his decision as follows:

> [In April,] this Court held that "the plaintiffs have failed to demonstrate to this

Court that any of the discovery requested pursuant to Federal Rules of Civil Procedure 56(f) is necessary to oppose the defendants' motions for summary judgment," and "grant[ed] the plaintiffs thirty (30) days to file a response to the defendants' motions for summary judgment."

Thereafter plaintiffs' counsel requested, and was granted, a number of extensions to file that response.

On May 28, 1991 plaintiffs' counsel, by way of letter, requested a further thirty (30) day extension. On May 31st this Court denied that request, and granted "one further, final, inflexible extension to June 12, 1991" for filing of plaintiffs' response to defendants' motions. In that ruling, a copy of which is appended hereto, this Court further stated that "If response to defendants' motions for summary judgment is not submitted by that date a Report and Recommendation will be submitted to Chief Judge Lambros recommending that such motions be granted for want of opposition."

No response to defendants' motions was filed by June 12th, or to this date.

On December 30, 1992, this Court issued a Memorandum Opinion and Order approving the Magistrate's recommendation to dismiss the action, but indicated the Court would "consider"

reinstating the case under certain conditions. In pertinent part, the Memorandum stated:

> Plaintiff's counsel in this case had ample opportunity to be heard and the dilatory management of the case by him cannot be overlooked. Therefore, the Report and Recommendations issued by Magistrate Judge David S. Perelman are adopted and approved and the case is dismissed. . . . The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management.

insufficient to comply with the letter and intent of this Court's Order and does not warrant reinstatement of the action. The document's vague assurances, linked to the admission that unexplained "international commitments" will require plaintiffs' lead counsel to "temporarily" relinquish primary responsibility for this litigation to his spouse, (who heretofore has served as second-chair), is a continuation of the pattern of conduct which led to dismissal of this action.

For these reasons, defendants respectfully submit that plaintiffs' Motion to Reinstate and Certification should be denied, and that judgment should be entered in favor of defendants.

Appendix K

Respectfully submitted,

s/ John T. Meredith
John T. Meredith (0015487)
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

Attorney for Defendants General
Electric Company, General Electric
Pension Board and John F. Welch, Jr.

s/ Mark A. Rock
Mark A. Rock (0010385)
Schwarzwald & Rock
616 Bond Court
1300 East Ninth Street
Cleveland, Ohlo 44114-1503
(216) 566-1600

Attorneys for Defendant Union

Appendix K

CERTIFICATE OF SERVICE

A copy of the foregoing Joint Brief of All Defendants in Opposition to Plaintiffs' Motion to Reinstate and Certification was mailed by first-class mail this 2nd day of January, 1993 to Daniel T. Todt and Rebecca L. Todt, Suite 200, Standard Building 1370 Ontario Street, Cleveland, Ohio 44113-1701, Attorneys for Plaintiffs; and to James G. Mauro, Jr., Esq., International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, 1126 Sixteenth St., N.W., Washington, D.C. 20036-4866.

s/ illegible
One of the Attorneys for Defendants

APPENDIX L — NOTICE OF APPEAL DATED MARCH 29, 1993

UNITED STATES DISTRICT COURT
NORTHERN DIVISION OF OHIO

Case No. 1:89:CV0170

Judge Thomas D. Lambros

DONALD HAYDOO, et al.

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al.

Defendants.

NOTICE OF APPEAL

On March 25, 1993 Counsel for Plaintiffs received from the Sixth Circuit Court of Appeals a Certified Copy of the Docket in the above captioned case due to an earlier filed Notice of Appeal. Said Docket shows in entry number 229 that a "JUDGMENT" was issued February 25, 1993 and entered March 2, 1993, stating that "in accordance with the Order of this date and the Memorandum Opinion and Order of December 30, 1992, this action is hereby dismissed and terminated." Counsel for Plaintiffs had not received a copy of, or notice of said "JUDGMENT" before March 25th 1993. Upon receipt of the docket Counsel obtained a copy of the "JUDGMENT" from the Court, which appears to be worded in such a way to establish it as a "*FINAL ORDER*" thereby appearing to negate the finalness of the previous two Orders.

Appendix L

Plaintiffs, (Donald Haydoo, Stanley Jake, Edward J. Parks, Peter Prokay, Leonard Rock, Jim Adkins, Darrel Atkins, Mitch Ball, Stuart Behnke, Homer Betts, James Black, Donald Bowman, Samuel Brown, George Bruck, Anthony Bukys, Jr., Miles Caton, Gary Clifton, John Costa, Robin Davis, Roy Demming, Johnnie Duncan, Robert Duplay, William Durst, James A. Fayne, Robert Ferrari, George Fischer, Jr., Richard Floyd, Bob Franks, Ron Fryzel, James Gallagher, Don Garrison, Ron Godwin, Myron Goldstone, Mark Gravatt, Ken Gregor, Don Griggs, Clyde Hart, Robert Haynes, Harold Hollingsworth, Matthew Hozjan, Joseph Hudak, Walter Huff, Harvey Jacobson, Chuck Jacubs, Don James, Ed Kapeluch, Bill Kennelly, Dennis King, William Knight, Robert Kobistek, Edward Koren, Wasyl Kotelewec, Alex Kozlowski, John Krapovich, Joe Kurpan, Ray Leegrand, Sylvester Legarth, Frank Lovsin, Howard Lusk, Steve Mackura, Henry Malm, David Martini, Leo Masztak, Louis Mate, George Maust, John McCullough, Dan McGuire, John Merk, Charles Michael, Paul Milroy, Dave Morrison, James Mostar, Frank Mozina, Anton Nemeth, Ben Nicolosi, Brian Omahen, Ken Parish, James Parks, Willie Patrick, Alex Peko, Doug Peko, William Petro, Len Piazza, Vincent Piscopo, Jerry Poduba, John Puscian, Joe Radich, James Rasul, Tom Rini, George Rivers, Paul Rozak, Bob Sanderson, George Schmitz, Sam Scibelli, Edward Sekura, David Sherman, Shirley Shoulders, Ron Snyder, Richard Spotts, Mike Spurio, Bill Stern, Jackie Summers, Jeffrey Takacs, Jerry Taylor, Mike Vasvary, Ray Vulinec, Gary Wiley, Pat Williams, John Williams, Robert Wolfrom, Sr., Bill Wood, Glen Worsley, Wilbur Yauger, Tommie Yee, Frank Zaccaro, Stefani Zidar, individually, and on behalf of all other persons similarly situated), hereby give notice that they are appealing to the Sixth Circuit Court of Appeals the JUDGMENT of February 25th, 1993 entered March 2nd, 1993; the docket entry notice of denial of Plaintiffs' Motions #222, which is a further explanation of the MEMORANDUM, OPINION AND

Appendix L

ORDER entered December 30, 1992, issued January 6, 1993, which incorporates the Orders, Reports and Recommendations of the Magistrate issued between March and June of 1991, which were for the first time adopted by this Court through said Order, and by filing said appeal hereby specifically Appeal all of the Orders Reports and Recommendations of the Magistrate, and the denial of Plaintiffs' Motions delineated in docket entry #222, further Plaintiffs' appeal the denial of all of their remaining Motions as stated in the December 30, 1992 Order; and the ORDER of February 25th 1993 issued March 2nd 1993.

The Defendants affected by this appeal are: General Electric Company; John F. Welch, Jr.,; International Union of Electronic, Electrical, Technical Salaried and Machine Workers, AFL-CIO; and General Electric Pension Board.

Respectfully submitted,
DANIEL T. TODT & ASSOCIATES

s/ Daniel T. Todt
Daniel T. Todt #0033178
Rebecca L. Todt #0033167
20th Floor The Standard Bldg.
1370 Ontario Street
Cleveland, Ohio 44113-1701
(216) 363-6044
Counsel for Plaintiffs

APPENDIX M — LETTERS/ENVELOPES ADDRESSED TO REBECCA L. TODT AS COUNSEL FOR *HAYDOO, ET AL.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
UNITED STATES COURTHOUSE
CLEVELAND, OHIO 44114
216-522-4992

DAVID S. PERELMAN
United States Magistrate

July 2, 1991

Rebecca L. Todt
Daniel T. Todt
1370 Ontario Street
Cleveland, Ohio 44113-1701

Re: Donald Haydoo, et al. v. General Electric Co., et al.
Case No. C89-170

Dear Mr. and Mrs. Todt:

Any objections to the Report and Recommendation transmitted to Chief Judge Lambros on June 27, 1991 are to be filed no later than ten (10) days from receipt of the Report and Recommendation, and should be forwarded to the Clerk of Courts. Failure to file objections waives a party's right to further appellate review. *See, Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walter*, 638 F.2d 947 (6th Cir. 1981).

Appendix M

DAVID S. PERELMAN
United States Magistrate Judge

s/ Sandy George
Sandy George
Secretary/Deputy Clerk

DSP/sg

Appendix M

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
U.S. POST OFFICE & COURT HOUSE BUILDING
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 684-2953

ORAL ARGUMENT NOTICE
February 11, 1994

Rebecca L. Todt
Daniel T. Todt

John T. Meredith

Mark A. Rock
David M. Fusco

Re: 93-3367 Haydoo vs. GE

Dear Counsel:

Your case will be heard by a panel of the Sixth Circuit on *5/2/94* in Cincinnati, Ohio. Please report to the Clerk's Office, Room 524 in the United States Post Office and Courthouse Building at the corner of 5th and Walnut Streets in Cincinnati, no later than *1:00 p.m.*

Court will convene promptly at *1:30 p.m.* Eastern Daylight Savings Time. Oral argument will be limited to 15 minutes for plaintiff; 15 minutes to be shared by defendants, unless expanded by the Court at the hearing, or by granting a motion by counsel prior to the hearing.

Appendix M

Unlike most circuits, the Sixth Circuit has continued to follow its traditional policy of allowing oral argument in all civil and criminal cases when requested by counsel. Oral argument may be waived by agreement of counsel, however, with the approval of the Court. Please consider carefully whether oral argument is needed in this case. If a waiver is appropriate in this case, please notify the court by means of a motion to that effect.

Your attention is called to Rule 19 of the Rules of the Sixth Circuit Court of Appeals regarding decisions from the bench. In appropriate cases, decisions may be made by the panel from the bench following oral argument.

Appendix M

ENVELOPE ADDRESSED TO REBECCA TODT FROM OFFICE OF THE CLERK, UNITED STATES DISTRICT COURT

(Omitted Here But Printed Separately As Lodging Appendix)

Appendix M

ENVELOPE ADDRESSED TO REBECCA TODT FROM SQUIRE, SANDERS & DEMPSEY

(Omitted Here But Printed Separately As Lodging Appendix)

APPENDIX N — REQUEST FOR RECONSIDERATION AND MODIFICATION OF ORDERS AND OBJECTIONS TO REPORTS AND RECOMMENDATIONS DATED JULY 10, 1991

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1: 89 CV 0170

JUDGE THOMAS D. LAMBROS

MAGISTRATE JUDGE PERELMAN

DONALD HAYDOO, et al.

Plaintiffs,

-v-

GENERAL ELECTRIC COMPANY, et al.,

Defendants.

REQUEST FOR RECONSIDERATION AND MODIFICATION OF ORDERS & OBJECTIONS TO REPORTS & RECOMMENDATIONS

PRELIMINARY STATEMENT

This Court issued three Orders on June 28, 1991, regarding the above captioned case. For the reasons stated below and the Motions, Amended Complaint (which was returned to Plaintiffs' Counsel a few minutes before this document was to be filed, said

Appendix N

Amended Complaint is filed herewith as Exhibit 6, the front sheet of which is served on the opposing parties as they already have the document) and Objections filed with the Court on June 28th, Plaintiffs respectfully request the Court to Reconsider and Modify its Orders, and respectfully object to Judge Magistrato Perelman's Reports and Reconsiderations in that they are "clearly erroneous and contrary to law."

Plaintiffs specifically call the Court's attention to the 5 Exhibits attached to the "Supplement to Plaintiffs' Response to Defendants Summmary Judgment Motion & Alternative Request for Hearing."

The Exhibits show:

that the named Plaintiffs have selected the five persons designated as class representatives;

that GE had a plan to shut down CEP while continuing operations;

that the Union and Welch were involved;

that age and length of service were main considerations reflecting policies of age discrimination;

that the monies GE claims to have in benefit funds can not be verified;

that GE deliberately closed down a profitable facility; and

> that GE did this due to problems with its benefit funding, policy of age discrimination and desire to continue the work of CEP under their direction and control while informing their employees that they no longer had a "need for the work," which they were not allowed to do under their contract.

I.

On June 28, 1991, this Court issued an Order denying Plaintiffs' Motion for leave to file a Third Amended Complaint.

Said Order stated:

> "PURSUANT TO this Court's Memorandum Opinion and Order of May 31, 1991,
>
> IT IS HEREBY ORDERED that plaintiff's [sic] Motion for leave to file a Third Amended Complaint is denied." Copy attached as Exhibit 1.

This Order was received July 5th, 1991. It came as a complete shock to Plaintiffs' counsel as counsel believed he had until June 28th to file. In fact, counsel had contacted Magistrate Perleman's office on June 28th for the purpose of seeking either a delay to Monday to file said responses, or for the Court to assist counsel in that counsel had been ordered the morning of the 28th, to attend a Court session which would not have allowed counsel the time to pick up at the printers and sign the documents necessary to file in this case.

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Counsel was told by Magistrate Perelman's secretary and Law Clerk, that he was not available as he was in a conference and that Judge Lambros was not in. Counsel was told to try back at 11 a.m. Counsel was able to resolve the other Court's demand for his attendance, by having associate counsel attend.

There was a document that Plaintiffs did not have and had to obtain from the Court. After filing the documents, Plaintiffs' counsel went to Magistrate Perelman's office, and introduced himself to the Secretary. Before he could say another word, the secretary stated, "You have to have your documents filed today, the Magistrate will not grant an extension". Counsel informed the secretary that, that was fine as the documents had already been filed, except the Affidavit of a party previously submitted under seal was needed as it had been taken in the burglary of counsel's home.

The office door to the Magistrate's office was open. Counsel assumes the Magistrate heard the discussion because the secretary stepped to the Magistrate's door and was told that counsel could get a copy of "whatever he needed".

On July 2nd, late in the afternoon, counsel for Plaintiff received a call from a clerk, believed to he named Jennifer, that the documents filed June 28th appear to "conflict with an Order issued that same day." It was too late for counsel to obtain the Orders from the Court. July 3rd counsel was in deposition. On July 5th the above Order was received.

On July 8th, counsel received, at his office, the attached Exhibit 2, (1st page of Order shown with envelope) an Order issued June 3, 1991, which based on the plastic bag it was in, had been damaged and delayed in delivery.

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After reviewing said Orders, Plaintiffs' can only inform the Court that everything their counsel has said is true. Documents which were given to Mr. Kennelly, as shown by his affidavit, were not immediately delivered to counsel.

Counsel had been told since before the case started, that the documents existed. When the burglary occurred, these were among the documents taken. Copies had to be retrieved. It was physically impossible to file any earlier and Plaintiffs were not aware of any Court Order.

I Conclusion

Plaintiffs deserve to win or lose this case based on the facts and case presented to the Court, not a delay in mail service.

For the above stated reasons, Plaintiffs respectfully request that the Court reconsider its Order issued June 28th, and modify it according to Plaintiffs' filings of June 28th.

II

This Court has issued an Order with a report and recommendation that Summary Judgment be granted for Defendants on all counts, stating that Plaintiffs have failed to respond and that such Motions must "be granted for want of opposition". See attached Exhibit 3, page 1 and 2, the attachment to said Order, being the June 3rd entry of the Court, is not provided.

The Court states further, that "No response to Defendants' Motion was filed by June 12th or to this date".

Plaintiffs object to this ludicrous misstatement of the facts and show of prejudice on behalf of the Court as well as the Courts

refusal to consider 10 volumes of evidence that Plaintiffs filed in response to Defendants' Summary Judgment Motions earlier, the Consolidated Brief filed 9/11/89, document #86 , Response to Summary Judgment filed 9/11/89 document #77, Response to Summary Judgment filed 2/12/91, document #173, and the responses filed the date this Order was issued.

II Conclusion

For the above stated reasons, Plaintiffs respectfully request that the Court reconsider and modify its Order granting Summary Judgment issued June 28th. To hold that Plaintiffs did not respond is "clearly erroneous and contrary to law" as stated in Thomas v. Arn, 474 U.S. 140 (1985); and United States v. Walter, 638 F2d 947 (6th Cir. 1981).

III

This Court also issued an Order on June 28th, denying Plaintiffs' Class Certification Motions, again based on Plaintiffs' failure to respond to the Orders that Plaintiffs reasonably believed they had until June 28th to respond to. The first two pages of said Order are attached hereto, as Exhibit 4. Again the Court reasons that Plaintiffs have not opposed said Memorandums and Opinions.

III Conclusion

Plaintiffs have supplemented all Motions and responded to all previous issued Memorandums and Opinions of the Court. As the Court states in its letter to Plaintiffs' counsel shown as Exhibit 5, Plaintiffs have "ten (10) days from receipt of the Report and Recommendation" to transmit objections. On the grounds stated by the Magistrate, his report and resulting recommendations must be rejected by the Judge.

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EPILOGUE

REQUEST FOR ORDER

Based on the failure to receive any notice from the Court of the requirement to file by June 12, 1991, until July 5, 1991, as the June 3rd Order was attached to the June 28th Reports and Recommendations, (through no fault of the Plaintiffs); the filing of the Objections to the previous Memorandums and Reports; the volumes of responses to Defendants' Summary Judgment Motions which the Court did not consider, and Plaintiffs' Supplements thereto; the filing of Plaintiffs Third Amended Complaint June 28, 1991; and the Courts "clearly erroneous" Reports and Recommendations when considering the above; Plaintiffs respectfully request that the trial Judge return said Reports and Recommendations to the Magistrate for reconsideration in lieu of the above cited filings, or in the alternative, to deny Defendants' Motions for Summary Judgment on the grounds that they have been fully responded to and refuted; grant Plaintiffs' Motions to Certify the three classes of Plaintiffs as stated in their Motion of June 28th; and Order the parties to negotiate and enter a Case Management Agreement for the prompt resolution of this case.

Respectfully submitted,

DANIEL T. TODT & ASSOCIATES

s/ Daniel T. Todt
Daniel T. Todt, 33178
20th Floor Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1701
(216) 363-6044
Attorney for Plaintiffs

Appendix N

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Request for Reconsideration and Modification of Orders and Objections to Reports and Recommendations, was served upon John Meredith, of Squire, Sanders and Dempsey, 1800 Huntington Bank Building, Cleveland, Ohio 44115, counsel for Defendants General Electric, John Welch and Pension Board; Mark Rock, of Schwarzwald & Rock, 600 Bond Court Building, Ohio 44114, Attorney for Defendant IUE, Robert Friedman, Esq., and James G. Mauro, Jr., Esq., 1126 Sixteenth Street, N.W., Washington, D.C. 20036-4866 via Regular U.S. Mail, this 10th day of July, 1991.

s/ Daniel T. Todt
Daniel T. Todt

Appendix N

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1: 89 CV 0170

JUDGE THOMAS D. LAMBROG

MAGISTRATE JUDGE PERELMAN

DONALD HAYDOO, et al.

Plaintiffs,

-v-

GENERAL ELECTRIC COMPANY, et al.

Defendants.

EXHIBIT 6 TO THE REQUEST FOR RECONSIDERATION AND MODIFICATION OF ORDERS AND OBJECTIONS TO REPORTS AND RECOMMENDATIONS

EXHIBIT 6

Exhibit 6 is the Third Amended Complaint filed June 6, 1991. The original is being filed with the Court. A copy of the first page only is being served on the opposing parties due to the fact that they already have the document in full.

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Respectfully submitted,

DANIEL T. TODT & ASSOCIATES

s/ Daniel T. Todt
Daniel T. Todt, 33173
20th Floor The Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1701
(216) 363-6044
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Exhibit 6 to the Request for Reconsideration and Modification of Orders and Objections to Reports and Recommendations, was served upon John Meredith, of Squire, Sanders and Dempsey, 1800 Huntington Bank Building, Cleveland, Ohio 44115, counsel for Defendants General Electric, John Welch and Pension Board; Mark Rock, of Schwarzwald & Rock, 600 Bond Court Building, Ohio 44114, Attorney for Defendant IUE, Robert Friedman, Esq., and James G. Mauro, Jr., Esq., 1126 Sixteenth Street, N.W., Washington, D.C. 20036-4866 via Regular U.S. Mail, this 10th day of July, 1991.

s/ Daniel T. Todt
Daniel T. Todt

Appendix N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 89-CV-0170

JUDGE THOMAS D. LAMBROS

MAGISTRATE JUDGE PERELMAN

THIRD AMENDED COMPLAINT
(With Jury Demand)

DONALD HAYDOO,
19148 Rashell Dr.,
Walton Hills, Ohio 44146,

STANLEY JAKE,
3670 Latimore Rd.
Shaker Heights, Ohio 44122

EDWARD J. PARKS,
1596 Grace Ave.,
Lakewood, Ohio 44107,

PETER PROKAY,
6094 Padua Dr.,
North Royalton, Ohio 44133,

LEONARD ROCK,
1648 Douglas Rd.,
Wickliffe, Ohio 44092,

Appendix N

Individually,
and on behalf of all other
persons similarly situated,

JIM ADKINS,
3537 Wood Rd.,
Eastlake, Ohio 44057,

DARREL ATKINS,
265 Plymouth Dr.,
Eastlake, Ohio 44094,

MITCH BALL,
36512 Spindrift,
Eastlake, Ohio 44094,

STUART BEHNKE,
3046 Worell Dr.,
Willoughby Hills, Ohio 44094,

HOMER BETTS,
8350 Alpine Dr.
Kirtland, Ohio 44094

JAMES BLACK,
4011 Bush Ave.,
Cleveland, Ohio 44109,

APPENDIX O — AFFIDAVIT OF SANDRA MERKLE

STATE OF OHIO)
) ss. AFFIDAVIT
COUNTY OF CUYAHOGA)

I, Sandra J. Merkle, 20th Floor The Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113-1701, being first duly sworn, deposes and says:

1. I am a legal secretary employed at DANIEL T. TODT & ASSOCIATES.

2. Among my duties are to open the mail and stamp it in when received.

3. The Order of the Court issued June 3rd 1991 in the Case of *Haydoo, et al., v. General Electric et. al.*, No. 1:89-CV-0170 was received in a plastice envelope, for damaged mail from the U.S. Postal Service on July 5th 1991, the same day we received the Orders from the Court issued July 1st 1991.

FURTHER AFFIANT SAYETH NAUGHT.

s/Sandra Merkle
Sandra Merkle

Appendix O

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

Before me, a notary public in and for said county, personally appeaqred the above SANDRA MERKEL who acknowledged that she did sign the forgoing instrument and that the same is her free act and deed.

In Testimony Whereof, I have hereunto affixed my name and official seal at Cleveland, Ohio this 11th day of December, 1991.

s/ Daniel T. Todt
NOTARY PUBLIC

SECOND APPENDIX

LISTING OF THE PARTIES TO THE PROCEEDINGS

Donald Haydoo, Stanley Jake, Edward J. Parks, Peter Prokay, Leonard Rock, Jim Adkins, Darrel Atkins, Mitch Ball, Stuart Behnke, Homer Betts, James Black, Donald Bowman, Samuel Brown, George Bruck, Anthony Bukys, Jr., Miles Caton, Gary Clifton, John Costa, Robin Davis, Roy Demming, Johnnie Duncan, Robert Duplay, William Durst, James A. Fayne, Robert Ferrari, George Fischer, Jr., Richard Floyd, Bob Franks, Ron Fryzel, James Gallagher, Don Garrison, Ron Godwin, Myron Goldstone, Mark Gravatt, Ken Gregor, Don Griggs, Clyde Hart, Robert Haynes, Harold Hollingsworth, Matthew Hozjan, Joseph Hudak, Walter Huff, Harvey Jacobson, Chuck Jacubs, Don James, Ed Kapeluch, Bill Kennelly, Dennis King, William Knight, Robert Kobistek, Edward Koren, Wasyl Kotelewec, Alex Kozlowski, John Krapovich, Joe Kurpan, Ray Leegrand, Sylvester Legarth, Frank Lovsin, Howard Lusk, Steve Mackura, Henry Malm, David Martini, Leo Masztak, Louis Mate, George Maust, John McCullough, Dan McGuire, John Merk, Charles Michael, Paul Milroy, Dave Morrison, James Mostar, Frank Mozina, Anton Nemeth, Ben Nicolosi, Brian Omahen, Ken Parish, James Parks, Willie Patrick, Alex Peko, Doug Peko, William Petro, Len Piazza, Vincent Piscopo, Jerry Poduba, John Puscian, Joe Radich, James Rasul, Tom Rini, George Rivers, Paul Rozak, Bob Sanderson, George Schmitz, Sam Scibelli, Edward Sekura, David Sherman, Shirley Shoulders, Ron Snyder, Richard Spotts, Mike Spurio, Bill Stern, Jackie Summers, Jeffrey Takacs, Jerry Taylor, Mike Vasvary, Ray Vulinec, Gary Wiley, Pat Williams, John Williams, Robert Wolfrom, Sr., Bill Wood, Glen Worsley, Wilbur Yauger, Tommie Yee, Frank Zaccaro, Stefani Zidar, individually, and on behalf of all other persons similarly situated.

Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

No. 94-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD HAYDOO, *et al.*,

Petitioners,

v.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR.; INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL AND SALARIED WORKERS, AFL-CIO and GENERAL ELECTRIC PENSION FUND BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

MARK A. ROCK
SCHWARZWALD & ROCK
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JAMES G. MAURO, JR.
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(202) 296-1200

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

13 pp

QUESTION PRESENTED

IUE is not dissatisfied with Petitioners' formulation of the question presented by this writ but the Court is advised that this question grossly misrepresents the proceedings which transpired before the District Court.

LIST OF PARTIES

Petitioners' statement is acceptable.

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Federal Rules Cited

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OPINIONS BELOW

Petitioners' statement of the Opinions Below is incomplete. It omits the dispositive decision of the District Court, which was reprinted in the Appendix at 60a.

STATEMENT OF JURISDICTION

Petitioners' Statement of Jurisdiction is acceptable.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Given Petitioners' statement of the Question Presented, the extensive list of statutory provisions and Federal Rules listed by Petitioners is irrelevant to the Court's consideration of this writ as none of the cited and quoted statutes bear upon the Question Presented. Nor does Fed. R. Civ. P. 11.

IUE nevertheless agrees with the citation to Fed.R.Civ.P. 41(b).

COUNTER-STATEMENT OF THE CASE

Plaintiffs initially filed their action in Ohio State Court and Defendants timely sought its removal. App. 48a

Thereafter, Plaintiffs' prosecution of the case was dilatory in the extreme and, as a result, this action was dismissed on December 30, 1992, pursuant to Fed.R.Civ.P. 41(b). App. 60a.

Reluctant to take that final step without allowing Plaintiffs counsel the opportunity to assure the Court that the

problems of the past would not continue in the future, the District Court's dismissal Order further provided:

> The Court will consider reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management.

App. 61a.

Despite this opportunity, lead counsel "stepped down," co-counsel "temporarily" assumed that position, and new lead counsel attempted to assure the District Court that "all briefing had been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management." App. 68a. Not surprisingly, given the circumstances, the District Court found these assurances insufficient, and denied Plaintiffs' motion to reinstate the case. App. 46a.

On appeal, the Sixth Circuit saw the key issue to be "whether the district court properly dismissed the case for dilatory case management. . ." App. 12a. After an exhaustive review of the history of the case below, the Sixth Circuit also concluded that dismissal was wholly appropriate. App. 1a.

Petitioners do not challenge the findings of dilatoriness. Rather they challenge the refusal of the District Court to reinstate this case. They thus challenge the wrong decision.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Petitioners' Question Presented Misrepresents the Decisions of the Sixth Circuit and the District Court

As the sole argument in support of their Petition for a Writ of Certiorari, Plaintiffs assert that the Sixth Circuit affirmed the District Court's dismissal for the insubstantial and indefensible reason that "an attorney of record who was not 'lead counsel' signed a motion." Petition at 13. That point of contention is simply not what happened in the disposition of the case below.

As the Sixth Circuit noted, not once, but twice:

> The matter before this court is whether the district court properly dismissed the case for dilatory case management pursuant to Fed.R.Civ.P. 41.

App. 2a. And:

> Although Plaintiffs raise 25 issues of error on appeal, the only relevant issue before us is whether Plaintiffs' dilatory prosecution of the case warranted dismissal pursuant to Fed.R.Civ.P. 41(b). (Footnote omitted.)

App. 11a. In answer to this question, the Court of Appeals found:

> The district court dismissed the action based on prior dilatory case management and the failure to comply with the magistrate judge's orders.

App. 12a. Plainly, the Sixth Circuit recognized, understood, and held that the issue of the dilatory prosecution of this case, not the issue of who signed a motion to reinstate, formed the basis for dismissal by the District Court and its affirmance by the Sixth Circuit.

Petitioners are quite simply in error as to the basis for the decision of the district and appellate courts. As such, their contention that this is an appropriate case for review must fail.

II. Petitioners Are Attempting to Divert Attention From the Findings of Dilatory Case Management

Petitioners acknowledge, in passing, the Sixth Circuit's view that the District Court dismissed this action for dilatory case management, but contend that the Sixth Circuit misapprehended "Judge Lambros' own reasons for dismissing the case."[1] Petition at 13. Petitioners understandably seek to draw this Court's attention from the damaging findings of the Sixth Circuit:

> The clear record of delay is undeniable. For over three years, Plaintiffs missed deadlines, filed inadequate motions and responses, and disregarded specific orders from the magistrate judge.

---

[1]Petitioners confuse the decision of the District Court, denying the motion to have the case reinstated (App. 68a), with the original decision of the District Court dismissing the action for dilatory conduct of the litigation (App. 46a). Petitioners' entire argument is founded upon the belief that the denial of the Motion to Reinstate affected the dismissal of the litigation. This assertion is wholly lacking in logic or support in the record.

> After Defendants filed two sets of summary judgment motions, Plaintiffs filed ten volumes of unauthenticated and unreliable documents and short 'briefs' lacking responsive arguments. Although the magistrate judge showed considerable patience and tried to guide Plaintiffs in amending their filings, the Plaintiffs never complied with the magistrate judge's suggestions about how to plead a meritorious case.
>
> Finally, after the magistrate judge had granted three extensions based on questionable excuses, he imposed a final, inflexible deadline that Plaintiffs ignored. ... Plaintiffs failed to respond until 16 days after the final deadline.

App. 15a.

Petitioners' hesitancy to confront the accuracy of these embarrassing findings and conclusions is as understandable as it is fatal. Petitioners' obligation under Rule 14.1(a) of the Supreme Court is to set forth those questions they wish reviewed, and "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Because Petitioners have failed to seek review of the Sixth Circuit's decision on the merits of the lower Court's dismissal, they have failed to address an issue which would

allow this Court to grant the Petition.

III. The District Court Judge Did Not Abuse His Discretion

While Petitioners contend that the District Court should have reinstated their case subsequent to dismissal because they satisfied the concerns of District Court Judge Lambros, no reasonable basis for disturbing the dismissal of this case exists.

Given the unprecedented history of dilatory, inadequate and unresponsive representation by Petitioners' counsel, the duty of the District Court to concern itself over future management of the case by Plaintiffs' counsel cannot be overlooked. Nor can the court's conclusion that counsel failed to assure that the future would be different from the past.

Despite the international ubiquity of fax machines, Plaintiffs' lead counsel, Daniel Todt, never signed the certification required by the District Court. The suggestion of Petitioners that it should not have mattered which counsel of record signed the motion[2] is at odds with their certification to the District Court. There, it was plainly acknowledged that Daniel Todt had been lead counsel, that Rebecca Todt was taking over as lead counsel, and that such a change was merely temporary:

> Plaintiffs request that this Court take notice that as of this date, Rebecca L. Todt will temporarily assume the position

---

[2]E.g., "...case law supports joint and several responsibility among attorneys of record for all aspects of motion practice and case management." Petition at 18.

> of lead counsel in this case due to international commitments that have arisen placing extensive time restraints on Daniel T. Todt.[3]

App. 68a. The certification then continued that "Rebecca L. Todt hereby certifies..." that Plaintiffs' counsel's future would be in conformity with the Court's Rules.

The failure of (temporarily) and conveniently indisposed lead counsel to sign a motion guaranteeing the manner in which the case will be handled in the future, and his failure to supplement the certification when its inadequacies were highlighted by Defendants, provides an unassailable basis for the refusal of the District Court to reinstate Plaintiffs' case. Counsel for Plaintiffs did not give any indication as to how long Mrs. Todt wold hold her new position as lead counsel. They did not advise the court under what circumstances that role would revert to Daniel Todt. They did not indicate how long these unspecified "international commitments" would prevent Daniel Todt from resuming his role as the Plaintiffs' principal counsel. They did not indicate any reason why he could not have the certification sent via Federal Express to him in Germany for execution, or why his signature could not be presented as a faxed copy, to be substituted with an original.[4] Under these

---

[3]Petitioners brief claims that "Mr. Todt's absence was by no means 'unspecified'." Yet his "international commitments" were never revealed to Defendants' counsel or divulged in any document heretofore filed with the lower Court.

[4]The Memorandum Opinion and Order dismissing and terminating the case was issued on December 30, 1992. App. 46a. The Certification solicited in that Memorandum Opinion and Order was filed as a Motion to Reinstate & Certification on January 12, 1993.

circumstances, including the dilatory, inadequate and unresponsive representation provided by Daniel T. Todt as Plaintiffs' counsel from the inception of the case, the decision of the District Court to deny substitute lead counsel's motion to reinstate this case (App. 46a) was not an abuse of discretion.

IV. No Special Considerations Warrant Granting Certiorari

Rule 10 of the Supreme Court sets forth the general considerations determining whether a writ of certiorari should be granted. None of the considerations identified in that rule are presented by this case. The facts and arguments of this case make it somewhat unique, as far as the remarkable behavior of Plaintiff's counsel is concerned. However, that does not create a basis for the Court to hear this case. As amply demonstrated by the Sixth Circuit, case authority provides a sound basis for upholding the dismissal of this case, pursuant to Fed.R.Civ.P. 41(b). The conduct here was far beyond that which can and should be tolerated by any district court. The decisions of this and other courts support this result. Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Little v. Yeutter, 984 F.2d 160 (6th Cir. 1993); Buck v. Dept. of Agriculture, 960 F.2d 603 (6th Cir. 1992); Shepard Claims Service, Inc. v. William Darrag & Associates, 796 F.2d 190 (6ty Cir. 1986); Carter v. City of Memphis, 636 F.2d 159 (6th Cir. 1980).

App. 68a. Defendants opposed the requested reinstatement on January 22, 1993. App. 70a. The district court did not rule on the motion of Plaintiffs until February 25, 1993. App. 46a.

V. Conclusion

For all of the foregoing reasons, the Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

Attorneys for Respondent International Union of Electronic, Electrical, Technical and Salaried Workers, AFL-CIO

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1126 Sixteenth Street, N.W.
Washington, D.C. 20036-4866

Mark A. Rock
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Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

No. 94-528

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DONALD HAYDOO, *et al.*,

Petitioners,

v.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR.,; INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL AND SALARIED WORKERS, AFL-CIO and GENERAL ELECTRIC PENSION FUND BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

John T. Meredith
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500
Attorneys for Respondents, General Electric Company, General Electric Company Pension Board, and John F. Welch, Jr.

PARTIES

Petitioners are correctly identified in the Petition. Respondents are the General Electric Company, (hereinafter "General Electric"); the General Electric Company Pension Board, (hereinafter "Pension Board"); John F. Welch, Jr., (hereinafter "Welch"); and the International Union of Electronic, Electrical, Technical Salaried and Machine Workers, AFL-CIO, (hereinafter "IUE"). General Electric, the corporate defendant, does not have a parent company. Its subsidiaries with publicly held equity securities are: General Electric Capital Corporation, Montgomery Ward & Co., Inc., General Electric Capital Preferred Asset Corporation, and CAMCO, Inc., (Canada). Its subsidiaries with publically held debt securities are: General Electric Capital Services, Inc., GECC Financial Corporation (Hawaii), General Electric Capital Canada, Inc., General Electric Credit International, N.V., GNA Corporation, Mercur Bank (Austria), Imaging Financial Services, Inc., and Dart & Kraft Leasing Corporation. Further, it must be noted that the Pension Board is an unincorporated group of General Electric employees who have certain administrative responsibilities regarding the General Electric Pension Plan; it is not a separate legal entity and lacks capacity to sue or be sued.

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OPINIONS BELOW

In addition to opinions cited at page 2 of the Petition, Respondents submit that the Court's December 30, 1992 Memorandum Opinion and Order dismissing the case, (Appendix to Petition at 60a), and the Magistrate's June 27, 1991 Report and Recommendation recommending dismissal, (Appendix to Petition at 62a), are relevant to this matter.

JURISDICTION

Respondents General Electric, Welch and Pension Board agree with petitioner's Statement of Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions quoted in the Petition include the only pertinent provision, which is Rule 41(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioners in this case are one hundred and ten (110) former employees of General Electric's Cleveland Equipment Plant, which closed in December 1987. Respondents are the General Electric Company, ("General Electric"), John F. Welch, Jr., (General Electric's Chief Executive Officer and Chairman of the Board), the General Electric Company Pension Board, ("Pension Board"), and the International Union of Electronic, Electrical, Technical and Salaried Workers, AFL-CIO, ("IUE").

The Complaint was filed by ten plaintiffs in state court in December 1988. The case was promptly removed to the United States District Court for the Northern District of Ohio, Eastern Division. Shortly thereafter the First Amended Complaint was filed, principally to add 100 additional named plaintiffs. Both the Complaint and First Amended Complaint contained ten counts -- nine Counts challenging General Electric's decision to close the plant on various state and federal law theories, and one count asserting that the IUE breached its duty of fair representation, apparently because it was unable to stop the plant closing.

From the outset, Petitioners engaged in a course of dilatory and obstructionist conduct which is detailed in the Opinion of the Court of Appeals, (Appendix A to Petition at 1a-11a). These events culminated in the Magistrate's June 27, 1991 recommendation that "defendants' motions for summary judgment be granted for want of opposition," (Appendix H to Petition at 62a). This recommendation was "adopted and approved" by Chief Judge Thomas Lambros on December 30, 1992 because of "dilatory management of the case" by plaintiffs' counsel, (Appendix G to Petition at 60a). However, the December 30, 1992 Memorandum Opinion went on to state that the "Court will *consider* reinstating the case, within 30 days of this Order, upon motion by plaintiff certifying that all briefing has been completed, all discovery requests complied with, and that in the future counsel will attend to all time-lines established for case management." (Appendix G to Petition at 61a, emphasis supplied.)

In response, Petitioners filed a short, conclusory motion, signed by an attorney in the office of Petitioners'

lead counsel. The motion stated that lead counsel Daniel Todt would be temporarily unable to participate in the action due to unspecified "international commitments." However, it went on to assure the Court in conclusory fashion that "in the future all time-lines established for case management will be met by Plaintiffs and that procedures will be established to ensure that similar situations will not occur in the future." (Appendix J to Petition at 68a.)

The Court deemed this cursory response insufficient, and dismissed the case on February 25, 1993. The Court reiterated that "plaintiffs' counsel in this case had ample opportunity to be heard" and that his "dilatory management of this case cannot be overlooked." (Appendix D to Petition at 47a.) Then, noting that "Mr. Todt, as lead counsel, cannot make the commitments or sign the certification" required by the December 1992 Order, the Court entered judgment against Petitioners.

On appeal, the United States Court for the Sixth Circuit affirmed. Its affirmance was *not* based on the signature issue raised by the Question Presented in the Petition. Rather, the Court of Appeals held:

> Here, the district court gave the Plaintiffs notice their action was in jeopardy. The clear record of delay is undeniable. For over three years, Plaintiffs missed deadlines, filed inadequate motions and responses, and disregarded specific orders from the magistrate judge....Although the magistrate judge showed considerable patience and tried to guide Plaintiffs in amending their filings, the Plaintiffs

> never complied with the magistrate judge's suggestions about how to plead a meritorious case.
>
> Finally, after the magistrate judge had granted three extensions based on questionable excuses, he imposed a final inflexible deadline that Plaintiffs ignored....
>
> Plaintiffs engaged in over three years of missed deadlines. Further, the documents Plaintiffs filed were woefully inadequate. Under the circumstances and history of this case, the dismissal was not an abuse of discretion.

A Motion for Rehearing, with Suggestion for Rehearing En Banc, was denied, and this Petition was filed. The Question Presented in the Petition *does not challenge* the findings of dilatory conduct and "woefully inadequate" filings. It is not directed to the rationale for the Magistrate's dismissal recommendation, or to the pattern of "dilatory management" to which the District Court alluded in both its December 1992 and February 1993 Orders, or to the stated reasons for the Court of Appeals' decision affirming dismissal. Rather, it focuses solely on the District Court's statement that Petitioners' lead counsel could not even be bothered to sign the motion for reinstatement of the case.

REASONS FOR DENYING THE WRIT

The Petition does not meet or attempt to meet any of the criteria for granting certiorari established by Rule 10.1 of the Rules of the Supreme Court. The decision on appeal is

not "in conflict with the decision of another United States court of appeals on the same matter"; it did not decide "a federal question in a way that conflicts with applicable decisions of this Court"; and it does not present "an important question of federal law."

Rather, the Petition seeks review of a discretionary, fact-specific ruling in an unusual and idiosyncratic case. Such a question is generally inappropriate for review on certiorari. For several reasons, review is particularly inappropriate in this case.

First, the Question Presented is not really presented by the record. It assumes that the sole basis for the decision below was the failure of lead counsel to sign a motion for reinstatement of the case to the docket. This is not the case. Rather, the Magistrate recommended dismissal only when Petitioners failed to comply with Court deadlines after repeated instructions and a final warning. The trial court adopted the recommendation because of the pattern of "dilatory management," which it noted in both its December 1992 and February 1993 rulings. The Court of Appeals affirmed because Petitioners "engaged in over three years of missed deadlines," filed "woefully inadequate" documents, and failed to comply with court-established filing deadlines even after "notice their action was in jeopardy."

Second, having properly dismissed the case under Rule 41(b), the Court had no obligation whatsoever to reinstate the case to the docket. The December 1992 Order indicated only that the Court would "consider" reinstatement

if Petitioners could satisfy the Court that the case could proceed in an orderly fashion. A statement that the Court might exercise discretion and give the Petitioners yet another break hardly obligated the Court to do so.

Third, the Motion to Reinstate filed by Petitioners manifestly did not satisfy the intent of the Court's offer to consider reinstatement. The Motion advised the Court that "lead counsel" would be temporarily unable to participate in the litigation due to unspecified "international commitments," which apparently were more important to lead counsel than prosecuting this case. This hardly indicated a change in the attitude which had permeated Petitioners' prosecution of the case during the preceding four years. Moreover, certification of prospective compliance by an attorney who would only temporarily serve as lead counsel hardly assured the Court that the case would be diligently prosecuted on an ongoing basis. Further, the certification only represented that "procedures *will be* established to ensure that similar situations will not occur." After four years, such procedures still were not in place. Under these circumstances, it is understandable that the Court noted lead counsel had not even made the effort to sign the requested certification.. Therefore, not only does the Petition fail to raise an important question of federal law, but also, the Court's decision denying the Motion to Reinstate was not an abuse of discretion.

CONCLUSION

For reasons set forth herein, and each of them, Respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

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